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MEMORANDUM **(updated 7/11/13)**

This memorandum lists the instructions the Tennessee Pattern Jury Instruction Committee (Criminal) changed or created after the 16th edition of the book was published in 2012. The Administrative Office of the Courts' website includes Word and WordPerfect "without comments and footnotes" versions of the instructions at issue. The "with comments and footnotes" versions of newly-created or substantially revised instructions 4.01(a), 6.02, 6.02(a), 8.08(b), 10.08(b), 16.01, 16.02, 16.03, 31.11(a), 31.21, 38.02, 42.11(a), and 43.01 are attached to this memorandum.

0.00 – Criminal Jury Charge Checklist

- a. On p. 4, insert "__ 42.11(a) Prior statement of the defendant" immediately below "__ 42.11 Confession (admission against interest)"
- b. On that same page, insert "__ 43.01 When rule 29 motion for judgment of acquittal is granted in part" immediately below "__ 42.25 Election of offenses"

1.00 – Preliminary Jury Instructions

- a. Immediately prior to the paragraph on p.6 which begins with "After you have heard all of the evidence," add a new paragraph IN BRACKETS with the following text: [Languages other than English may be used during this trial. The evidence that you are to consider is only that provided through the official court interpreter. Although some of you may know the language of the non-English language used, it is important that all jurors consider the same evidence. Therefore, you must base your decision on the evidence presented in the English interpretation. You must disregard any different meaning of the non-English words.]

2.06 – Burden of Proof: Venue (Computer Offenses)

- a. Delete the "and" at the end of section (b), delete the period at the end of section (c) and substitute a semi-colon followed by "and" and insert the following new section (d):

(d) **[Only for computer offenses punishable as theft committed on or after 7/1/12:]** in any county where one (1) or more elements of the offense occurred, or in the county where an act of solicitation, inducement, offer, acceptance, delivery, storage, or financial transaction occurred involving the property, service or article of the victim.

b. Following this new section (d), insert a footnote with the following text: T.C.A. § 39-14-105(c).

4.01 – Criminal Attempt

- a. Add "(other than attempted first degree murder with serious bodily injury)" to the title, and insert a footnote following this new language. The text of the footnote will be as follows: The trial judge should utilize 4.01(a) if the charged offense is attempted first degree murder, the indictment alleges that the victim suffered serious bodily injury, and the offense was committed on or after 7/1/13.

4.01(a) – Criminal Attempt, to Wit: First Degree Murder Where the Victim Suffers Serious Bodily Injury

- a. New instruction

5.01 – Violation of RICO Act

- a. On page 53 delete the definition of "Racketeering activity" and substitute the language below. ALSO, move footnote 16 from its existing position to the end of the new language below.

[For offenses committed prior to 7/1/12: "Racketeering activity" means to commit, to attempt to commit, to conspire to commit, or to solicit, coerce, or intimidate another person to commit an act for financial gain which is a criminal offense as alleged in Count(s) _____ of the indictment.]

or

[For offenses committed on or after 7/1/12: "Racketeering activity" means [to commit, to attempt to commit, to conspire to commit, or to solicit, coerce, or intimidate another person to commit an act for financial gain that is a criminal offense involving *[controlled substances, and the amount of controlled substances involved in the offense is included under § 39-17-417(i) and (j) and its subdivisions]* *[aggravated sexual exploitation of a minor or especially aggravated sexual exploitation of a minor under §§ 39-17-1004(b)(1)(A) and 39-17-1005(a)(1)]* *[to commit, attempt to commit, conspire to commit, or to solicit, coerce, or intimidate another person to commit a criminal gang offense, as defined in § 40-35-121(a).]* (INSERT FOOTNOTE 16 HERE)

- b. In element (1) of Part A, Part B, Part C, Part D-1, Part D-2, and Part D-3, delete the words "is a person who"
- c. On pages 53-54, delete the definition of "unlawful debt" but RETAIN THE FOOTNOTE and substitute the following as the new definition in brackets: ["Unlawful debt" means any money or other thing of value constituting principal or interest of a debt that is legally unenforceable in this state in whole or in part, because the debt was incurred or contracted in violation of include here an offense alleged in the indictment that is listed in T.C.A. § 39-12-203(13).]

6.01 – Assault

- a. Add the following after element 3 in Parts A and B:

[and

(4) **only for offenses committed on or after 7/1/13:** that the offense was committed against a health care provider acting in the discharge of the provider’s duty.]]

- b. Add the following after element 4 in Part C:

[and

(5) **only for offenses committed on or after 7/1/13:** that the offense was committed against a health care provider acting in the discharge of the provider’s duty.]]

- c. Add the following as a new definition in brackets between the definitions of “bodily injury” and “law enforcement officer” on p. 58: [“Health care provider” means a person who is licensed, certified or otherwise authorized or permitted by the laws of this state to administer health care in the ordinary course of business in the practicing of a profession.]
- d. Following the closing bracket for this new definition, insert a footnote with the following text: T.C.A. § 39-13-101(c).
- e. In Comment 1, insert the following text after “law enforcement officer” but before the comma: or on or after 7/1/13 against a health care provider
- f. Add the following as a new comment: Tenn. Pub. Acts ch. 1006, §§ 2 & 4, effective 7/1/12, exempts from criminal liability “any act or omission by a pregnant woman with respect to an embryo or fetus with which she is pregnant.” See T.C.A. § 39-13-107(c) and -214(c). These statutes explicitly prohibit a criminal action against a woman for narcotic drug use that results in her newborn’s drug addiction or birth defects. See Tenn. Att’y Gen. Op. 13-01 (February 1, 2013), abrogating Tenn. Att’y Gen. Op. 08-114 (May 21, 2008).
- g. In footnote 8, insert “be” between “fetus” and “viable”

6.02 – Aggravated Assault

- a. The committee substantially revised this instruction, so the AOC is providing a “with comments and footnotes” version. Treat this as if it is a new instruction.

6.02(a) – Aggravated Assault (on or after 7/1/13)

- a. New instruction

6.03 – Reckless Endangerment

- a. Add the following as a new comment: Tenn. Pub. Acts ch. 1006, §§ 2 & 4, effective 7/1/12, exempts from criminal liability “any act or omission by a pregnant woman with respect to an embryo or fetus with which she is pregnant.” See T.C.A. § 39-13-107(c) and -214(c). These statutes explicitly prohibit a criminal action against a woman for narcotic drug use that results in

her newborn's drug addiction or birth defects. See Tenn. Att'y Gen. Op. 13-01 (February 1, 2013), abrogating Tenn. Att'y Gen. Op. 08-114 (May 21, 2008).

6.04 – Vehicular Assault

- a. Add the following as a new comment: Tenn. Pub. Acts ch. 1006, §§ 2 & 4, effective 7/1/12, exempts from criminal liability “any act or omission by a pregnant woman with respect to an embryo or fetus with which she is pregnant.” See T.C.A. § 39-13-107(c) and -214(c). These statutes explicitly prohibit a criminal action against a woman for narcotic drug use that results in her newborn's drug addiction or birth defects. See Tenn. Att'y Gen. Op. 13-01 (February 1, 2013), abrogating Tenn. Att'y Gen. Op. 08-114 (May 21, 2008).

6.06 – Criminal Exposure to [HIV] [HBV] [HCV]

- a. Add the following as a new Comment 4: Tenn. Pub. Acts ch. 1006, §§ 2 & 4, effective 7/1/12, exempts from criminal liability “any act or omission by a pregnant woman with respect to an embryo or fetus with which she is pregnant.” See T.C.A. § 39-13-107(c) and -214(c). These statutes explicitly prohibit a criminal action against a woman for narcotic drug use that results in her newborn's drug addiction or birth defects. See Tenn. Att'y Gen. Op. 13-01 (February 1, 2013), abrogating Tenn. Att'y Gen. Op. 08-114 (May 21, 2008).
- b. Following the semi-colon at the end of element (2)(b) on page 78, insert a footnote with the following text: See Comment 5.
- c. Create a new Comment 5 that provides as follows: Proof beyond a reasonable doubt that the transfer, donation or providing of blood, tissue, semen, organs or other bodily fluids or parts “presents a significant risk” of transmission may require expert testimony. See *State v. Ronnie Ingram*, W2011-02595-CCA-R3-CD, 2012 Tenn. Crim. App. LEXIS 887, 13-14 (Tenn. Crim. App. Oct. 31, 2012).

6.08(a) – Domestic Assault (on or after 4/10/08)

- a. Add the following as a new comment: Tenn. Pub. Acts ch. 1006, §§ 2 & 4, effective 7/1/12, exempts from criminal liability “any act or omission by a pregnant woman with respect to an embryo or fetus with which she is pregnant.” See T.C.A. § 39-13-107(c) and -214(c). These statutes explicitly prohibit a criminal action against a woman for narcotic drug use that results in her newborn's drug addiction or birth defects. See Tenn. Att'y Gen. Op. 13-01 (February 1, 2013), abrogating Tenn. Att'y Gen. Op. 08-114 (May 21, 2008).

7.01 – First Degree Murder – premeditated (on or after 7/1/95)

- a. At the end of element (2) on p. 94, a period appears immediately prior to the closing bracket. Delete that period and substitute a semi-colon.
- b. In the seventh line of element (2) on p. 94 delete “he” and substitute “[he] [she]” in italics.
- c. Add the following as a new comment: Tenn. Pub. Acts ch. 1006, §§ 2 & 4, effective 7/1/12, exempts from criminal liability “any act or omission by a pregnant woman with respect to an embryo or fetus with which she is pregnant.” See T.C.A. § 39-13-107(c) and -214(c). These statutes explicitly prohibit a criminal action against a woman for narcotic drug use that results in

her newborn's drug addiction or birth defects. See Tenn. Att'y Gen. Op. 13-01 (February 1, 2013), abrogating Tenn. Att'y Gen. Op. 08-114 (May 21, 2008).

7.02 – First Degree Murder – destructive device or bomb (on or after 7/1/95)

- a. Add the following as a new comment: Tenn. Pub. Acts ch. 1006, §§ 2 & 4, effective 7/1/12, exempts from criminal liability “any act or omission by a pregnant woman with respect to an embryo or fetus with which she is pregnant.” See T.C.A. § 39-13-107(c) and -214(c). These statutes explicitly prohibit a criminal action against a woman for narcotic drug use that results in her newborn's drug addiction or birth defects. See Tenn. Att'y Gen. Op. 13-01 (February 1, 2013), abrogating Tenn. Att'y Gen. Op. 08-114 (May 21, 2008).

7.03 – First Degree Murder – felony murder (on or after 7/1/95)

- a. Add the following as a new comment: Tenn. Pub. Acts ch. 1006, §§ 2 & 4, effective 7/1/12, exempts from criminal liability “any act or omission by a pregnant woman with respect to an embryo or fetus with which she is pregnant.” See T.C.A. § 39-13-107(c) and -214(c). These statutes explicitly prohibit a criminal action against a woman for narcotic drug use that results in her newborn's drug addiction or birth defects. See Tenn. Att'y Gen. Op. 13-01 (February 1, 2013), abrogating Tenn. Att'y Gen. Op. 08-114 (May 21, 2008).

7.05(a) – Second Degree Murder (knowing killing)

- a. Add the following as a new comment: Tenn. Pub. Acts ch. 1006, §§ 2 & 4, effective 7/1/12, exempts from criminal liability “any act or omission by a pregnant woman with respect to an embryo or fetus with which she is pregnant.” See T.C.A. § 39-13-107(c) and -214(c). These statutes explicitly prohibit a criminal action against a woman for narcotic drug use that results in her newborn's drug addiction or birth defects. See Tenn. Att'y Gen. Op. 13-01 (February 1, 2013), abrogating Tenn. Att'y Gen. Op. 08-114 (May 21, 2008).

7.05(b) – Second Degree Murder (drugs as proximate cause)

- a. Add the following as a new comment: Tenn. Pub. Acts ch. 1006, §§ 2 & 4, effective 7/1/12, exempts from criminal liability “any act or omission by a pregnant woman with respect to an embryo or fetus with which she is pregnant.” See T.C.A. § 39-13-107(c) and -214(c). These statutes explicitly prohibit a criminal action against a woman for narcotic drug use that results in her newborn's drug addiction or birth defects. See Tenn. Att'y Gen. Op. 13-01 (February 1, 2013), abrogating Tenn. Att'y Gen. Op. 08-114 (May 21, 2008).

7.06 – Voluntary Manslaughter

- a. Add the following as a new comment: Tenn. Pub. Acts ch. 1006, §§ 2 & 4, effective 7/1/12, exempts from criminal liability “any act or omission by a pregnant woman with respect to an embryo or fetus with which she is pregnant.” See T.C.A. § 39-13-107(c) and -214(c). These statutes explicitly prohibit a criminal action against a woman for narcotic drug use that results in her newborn's drug addiction or birth defects. See Tenn. Att'y Gen. Op. 13-01 (February 1, 2013), abrogating Tenn. Att'y Gen. Op. 08-114 (May 21, 2008).

7.07 – Criminally Negligent Homicide

- a. Add the following as a new comment: Tenn. Pub. Acts ch. 1006, §§ 2 & 4, effective 7/1/12, exempts from criminal liability “any act or omission by a pregnant woman with respect to an embryo or fetus with which she is pregnant.” See T.C.A. § 39-13-107(c) and -214(c). These statutes explicitly prohibit a criminal action against a woman for narcotic drug use that results in her newborn’s drug addiction or birth defects. See Tenn. Att’y Gen. Op. 13-01 (February 1, 2013), abrogating Tenn. Att’y Gen. Op. 08-114 (May 21, 2008).

7.08(a) – Vehicular Homicide (reckless conduct)

- a. Add the following as a new comment: Tenn. Pub. Acts ch. 1006, §§ 2 & 4, effective 7/1/12, exempts from criminal liability “any act or omission by a pregnant woman with respect to an embryo or fetus with which she is pregnant.” See T.C.A. § 39-13-107(c) and -214(c). These statutes explicitly prohibit a criminal action against a woman for narcotic drug use that results in her newborn’s drug addiction or birth defects. See Tenn. Att’y Gen. Op. 13-01 (February 1, 2013), abrogating Tenn. Att’y Gen. Op. 08-114 (May 21, 2008).

7.08(b) – Vehicular Homicide (intoxication)

- a. Add the following as a new comment: Tenn. Pub. Acts ch. 1006, §§ 2 & 4, effective 7/1/12, exempts from criminal liability “any act or omission by a pregnant woman with respect to an embryo or fetus with which she is pregnant.” See T.C.A. § 39-13-107(c) and -214(c). These statutes explicitly prohibit a criminal action against a woman for narcotic drug use that results in her newborn’s drug addiction or birth defects. See Tenn. Att’y Gen. Op. 13-01 (February 1, 2013), abrogating Tenn. Att’y Gen. Op. 08-114 (May 21, 2008).

7.08(c) – Vehicular Homicide (.08% alcohol concentration)

- a. Add the following as a new comment: Tenn. Pub. Acts ch. 1006, §§ 2 & 4, effective 7/1/12, exempts from criminal liability “any act or omission by a pregnant woman with respect to an embryo or fetus with which she is pregnant.” See T.C.A. § 39-13-107(c) and -214(c). These statutes explicitly prohibit a criminal action against a woman for narcotic drug use that results in her newborn’s drug addiction or birth defects. See Tenn. Att’y Gen. Op. 13-01 (February 1, 2013), abrogating Tenn. Att’y Gen. Op. 08-114 (May 21, 2008).

7.08(d) – Vehicular Homicide (drag racing)

- a. Add the following as a new comment: Tenn. Pub. Acts ch. 1006, §§ 2 & 4, effective 7/1/12, exempts from criminal liability “any act or omission by a pregnant woman with respect to an embryo or fetus with which she is pregnant.” See T.C.A. § 39-13-107(c) and -214(c). These statutes explicitly prohibit a criminal action against a woman for narcotic drug use that results in her newborn’s drug addiction or birth defects. See Tenn. Att’y Gen. Op. 13-01 (February 1, 2013), abrogating Tenn. Att’y Gen. Op. 08-114 (May 21, 2008).

7.08(e) – Vehicular Homicide (construction zone)

- a. Add the following as a new comment: Tenn. Pub. Acts ch. 1006, §§ 2 & 4, effective 7/1/12, exempts from criminal liability “any act or omission by a pregnant woman with respect to an embryo or fetus with which she is pregnant.” See T.C.A. § 39-13-107(c) and -214(c). These statutes explicitly prohibit a criminal action against a woman for narcotic drug use that results in

her newborn's drug addiction or birth defects. See Tenn. Att'y Gen. Op. 13-01 (February 1, 2013), abrogating Tenn. Att'y Gen. Op. 08-114 (May 21, 2008).

7.09 – Reckless Homicide

- a. Add the following as a new comment: Tenn. Pub. Acts ch. 1006, §§ 2 & 4, effective 7/1/12, exempts from criminal liability “any act or omission by a pregnant woman with respect to an embryo or fetus with which she is pregnant.” See T.C.A. § 39-13-107(c) and -214(c). These statutes explicitly prohibit a criminal action against a woman for narcotic drug use that results in her newborn's drug addiction or birth defects. See Tenn. Att'y Gen. Op. 13-01 (February 1, 2013), abrogating Tenn. Att'y Gen. Op. 08-114 (May 21, 2008).

8.01 – Kidnapping

- a. In the last line of the paragraph which begins with “Unless you find beyond a reasonable doubt” on page 174, delete “[especially] [aggravated] [kidnapping] [false imprisonment]” and substitute “kidnapping” without brackets.
- b. In footnote 2, delete 39-13-301(16) and substitute 39-13-301(15).

8.02 – Aggravated Kidnapping

- a. In the second line of the paragraph which begins with “only include if another offense was committed” on page 178, delete “kidnapping” and substitute “aggravated kidnapping”
- b. In the last line of the paragraph which begins with “Unless you find beyond a reasonable doubt” on page 179, delete “[especially] [aggravated] [kidnapping] [false imprisonment]” and substitute “aggravated kidnapping” without brackets.
- c. In footnote 2, delete 39-13-301(16) and substitute 39-13-301(15).

8.03 – Especially Aggravated Kidnapping

- a. In the second line of the paragraph which begins with “only include if another offense was committed” on page 183, delete “kidnapping” and substitute “especially aggravated kidnapping”
- b. In the last line of the paragraph which begins with “Unless you find beyond a reasonable doubt” on page 184, delete “[especially] [aggravated] [kidnapping] [false imprisonment]” and substitute “especially aggravated kidnapping” without brackets.
- c. In footnote 2, delete 39-13-301(16) and substitute 39-13-301(15).

8.05 – False Imprisonment

- a. In the second line of the paragraph which begins with “only include if another offense was committed” on page 193, delete “kidnapping” and substitute “false imprisonment”
- b. In the last line of the paragraph which begins with “Unless you find beyond a reasonable doubt” on page 194, delete “[especially] [aggravated] [kidnapping] [false imprisonment]” and substitute “false imprisonment” without brackets.

- c. In footnote 2, delete 39-13-301(16) and substitute 39-13-301(15).

8.06 – Involuntary Labor Servitude, etc.

- a. In the first line of Comment 2 on p. 199, delete 39-13-301(4) and substitute 39-13-301(6)

8.08(a) – Trafficking for Sexual Servitude (prior to 7/1/12)

- a. In footnote 2, delete 39-13-301(15) and substitute 39-13-301(15) (Supp. 2012).

8.08(b) – Trafficking for Commercial Sex Act

- a. The committee made numerous changes to this instruction, so a new “with comments and footnotes” version has been drafted. Treat this as if it is a new instruction.

9.02 – Aggravated Robbery

- a. Delete the text of element (4) on p. 215 and substitute the following text (the bracketed language will be italicized): that the defendant took such property from the person of another by *[the use of violence] [putting the person in fear] [the use of violence or by putting the person in fear]*
- b. Between the word “fear” and the closing bracket in the third set of bracketed language, insert a footnote which has the following text: Unless both fear and violence are mentioned in the indictment, this third bracket should not be used as “the accused cannot be tried for or convicted of an offense not charged in the indictment or information.” *State v. Goodson*, 77 S.W.3d 240, 244 (Tenn. Crim. App. 2001).
- c. On p. 216, put brackets around the paragraph which begins with “The fear constituting”
- d. On p. 219, put brackets around the definition of violence. Since there is already a bracket at the end of that paragraph, there will now be two brackets.

10.03 – Aggravated Sexual Battery

- a. Delete the definition of “intimate parts,” RETAIN THE FOOTNOTE, and substitute the following new definition: “Intimate parts” includes **[only for offenses committed on or after 7/1/13: semen, vaginal fluid,]** the primary genital area, groin, inner thigh, buttock or breast of a human being.
- b. In element (1) on p. 238, insert “that” in italics between the opening bracket and “the defendant had unlawful sexual contact with the alleged victim”

10.04 – Sexual Battery

- a. Delete the definition of “intimate parts,” RETAIN THE FOOTNOTE, and substitute the following new definition: “Intimate parts” includes **[only for offenses committed on or after 7/1/13: semen, vaginal fluid,]** the primary genital area, groin, inner thigh, buttock or breast of a human being.

10.04(b) – Sexual Battery by an Authority Figure (for offenses committed on or after 7/1/06)

- a. Delete the definition of “intimate parts,” RETAIN THE FOOTNOTE, and substitute the following new definition: “Intimate parts” includes **[only for offenses committed on or after 7/1/13: semen, vaginal fluid,]** the primary genital area, groin, inner thigh, buttock or breast of a human being.

10.05 – Statutory Rape (prior to 7/1/06)

- a. Delete Comment 4.

10.07 – Spousal Sexual Battery

- a. Add the following to the title of this instruction: (for offenses committed prior to 6/18/05)
- b. After this new language insert a footnote that has the following text: 2005 Public Chapter 456, effective 6/18/05, repealed this offense.

10.08(a) – Promoting Prostitution of a [Minor] [Person with an Intellectual Disability]

- a. Delete the closing bracket following element 3 in Part A, Part B, Part C, Part D, Part E and Part F and insert the following after the third element:

[and

- (4) **Only for offenses committed on or after 7/1/13:** *[that one (1) or more of the persons engaged in prostitution was less than fifteen (15) years of age] [that the offense occurred [on the [grounds] [facilities]] [within one thousand feet (1,000')] of a [public or private school] [secondary school] [preschool] [child care agency] [public library] [recreational center] [public park].]*

- (b) Add the following at the end of Comment One: Promoting prostitution of a minor on or after 7/1/13 is punishable as trafficking for a commercial sex act. T.C.A. § 39-13-515(c).

10.08(b) – Promoting Travel for Prostitution

- a. New instruction

10.11 – Indecent Exposure

- a. Add the following definition of “intimate parts” to the end of the definition of “sexual contact” on p. 301: “Intimate parts” includes **[only for offenses committed on or after 7/1/13: semen, vaginal fluid,]** the primary genital area, groin, inner thigh, buttock or breast of a human being.
- b. Insert a footnote with the following text at the end of this new definition: T.C.A. § 39-13-501(2).

10.18 – Sexual Contact with Probationer or Parolee

- a. The definition of “intimate parts” appears at the end of the definition of “sexual contact” on p. 364. Delete the existing definition of “intimate parts,” RETAIN THE FOOTNOTE, and substitute the following new definition: “Intimate parts” includes **[only for offenses committed**

on or after 7/1/13: semen, vaginal fluid,] the primary genital area, groin, inner thigh, buttock or breast of a human being.

10.19 – Sexual Contact With Inmates (on or after 7/1/06)

- a. The definition of “intimate parts” appears at the end of the definition of “sexual contact” on p. 367. Delete the existing definition of “intimate parts,” RETAIN THE FOOTNOTE, and substitute the following new definition: “Intimate parts” includes **[only for offenses committed on or after 7/1/13:** semen, vaginal fluid,] the primary genital area, groin, inner thigh, buttock or breast of a human being.

10.22 – Soliciting Minors to Engage in [Certain Conduct]

- a. Delete the text of element 3 on page 374 and substitute the following: that the conduct, if completed, would constitute a violation by the defendant of the offense(s) of: *include here an offense alleged in the indictment that is listed in T.C.A. § 39-13-528(a);*
- b. In element 4, insert “that” before “the defendant acted intentionally.”

10.23 – Soliciting Sexual Exploitation of a Minor

- a. Insert the following as a new paragraph at the end of the instruction but prior to the Comments section: **[Only for offenses committed on or after 7/1/13:** It is not a defense that the minor victim consented to the conduct that constituted the offense.]
- b. Insert a footnote with the following text after the closing bracket of this new language: T.C.A. § 39-13-529(g). The Committee is of the opinion that even though the legislature enacted this language for offenses committed on or after 7/1/13, this does not necessarily mean that consent would be a defense for offenses committed prior to that date.

11.03(a) – Fixing Value

- a. On p. 392, add a new ***bracketed*** section (F), which will have the following text: If the animal killed was a police dog, fire dog, search and rescue dog, service animal or police horse, the jury shall consider the value of the police dog, fire dog, search and rescue dog, service animal or police horse as both the cost of the animal and any specialized training the animal received.
- b. Following this new language, add a footnote which has the following text: T.C.A. § 39-14-205(a)(2).
- c. On p. 392, add a new ***bracketed*** section (G), which will have the following text: In determining the value of the property vandalized, the value of the property shall be fixed at the amount of the damage, the reasonable cost of repairing the damage to the property, or the cost of replacement of the property vandalized.
- d. Following this new language, insert a footnote which has the following text: See T.P.I. CIVIL – 14.45.
- e. On p. 392, add a new ***bracketed*** section (H), which will have the following text: In determining the value of the destruction or interference, the value of the destruction shall be fixed at the

amount of the damage or the cost of replacement of the property. The value of the interference shall be fixed at the amount of the interference to the railroad.

- f. Following this new language, insert a footnote which has the following text: T.C.A. § 39-14-114(b).
- g. On p. 392, add a new ***bracketed*** section (I), which will have the following text: [For a violation of 16.01 and 16.03 and a violation of some provisions in 16.02 only] Value includes *[the face value of the creation of or amount of alteration to any financial instrument or of an electronic transfer of funds] [the cost of any alteration, damage, destruction or disruption to any computer, computer system, computer network, computer software, program, or data] [the market value of any unauthorized copy, in any form, including, but not limited to, any printed or electronic form of computer data, computer programs, or computer software residing in, communicated by, or produced by a computer or computer network] [the amount of any proceeds received, concealed or used]*.
- h. Following this new language, insert a footnote which has the following text: T.C.A. § 39-14-602(a)-(c).
- i. In the third line of the first paragraph, on p. 391, insert “[money]” after “[property] [services]” and prior to the period. Italicize this new language. The existing language is already italicized.

11.35(a) – Identity Theft (on or after 7/1/04)

- a. Delete the period at the end of element 3 on p. 468 and insert the following in italics: **[only for offenses committed on or after 7/1/13:** by obtaining a controlled substance by fraud or committing prescription drug fraud by using a prescription for a controlled substance represented as having been issued by a physician, nurse practitioner, or other health care provider (INSERT FOOTNOTE HERE)].
- b. The text of the footnote that will be inserted after “provider” will be as follows: The trial judge should charge T.P.I. – Crim. 31.11, Obtaining controlled substance by fraud, or T.P.I. – 31.11(a), Prescription drug fraud, in appropriate fact situations.
- c. Insert the following as a new element (5) in the definition of “Personal identifying information”:

(5) Any name, number, information, medical prescribing pad, electronic message, or form used by a physician, nurse practitioner, or other health care provider for prescribing a controlled substance
- d. In the definition of “Personal identifying information,” delete the “or” that appears after element (3). Also, delete the period that appears after element (4) and substitute “; or” at the end of that element. Finally, move the period and footnote that currently appear at the end of element (4) to the end of the new element (5).

11.42 – TennCare Fraud

- a. In element 2 of Part C on p. 494, delete the last two lines (“the defendant used TennCare to pay for [the clinical visit] [payment of the controlled substances]”) and substitute the following: the defendant used TennCare **[only for offenses committed prior to 4/16/13:** to pay for *[the*

clinical visit] *[payment of the controlled substances];*] **[only for offenses committed on or after 4/16/13: to obtain the benefits;]**

12.02 – Intentional Killing of Animal

- a. Delete the last paragraph of this instruction (pp. 503-04) and substitute the following bracketed text: [The trial judge should now instruct the jury with respect to fixing the value of the animal killed utilizing T.P.I. – Crim. 11.03(a), Fixing Value, using both sections (A) and (F), if applicable.]
- b. Add a new comment with the following text: Venue in a prosecution for this offense shall be in the county where one (1) or more elements of the offense occurred, or in the county where an act of solicitation, inducement, offer, acceptance, delivery, storage, or financial transaction occurred involving the animal.

14.04 – Vandalism

- a. Delete the last paragraph of this instruction (p. 561) and substitute the following bracketed text: [The trial judge should now instruct the jury with respect to fixing the value of the property damaged or destroyed utilizing T.P.I. – Crim. 11.03(a), Fixing Value, using both sections (A) and (G), if applicable.]

14.11 – Destruction or Interference with Property Utilized by Railroads

- a. Delete the last paragraph of the instruction on p. 581 and substitute the following text: [If the offense on trial does not involve imminent danger of death or serious bodily injury, the trial judge should now instruct the jury with respect to fixing the value of the destruction or interference utilizing T.P.I. -- CRIM. 11.03(a), Fixing Value, using both sections (A) and (H), if applicable.]
- b. Insert the following text at the end of the second paragraph of Comment One: If it is punished as theft, venue in a prosecution for this offense shall be in the county where one (1) or more elements of the offense occurred, or in the county where an act of solicitation, inducement, offer, acceptance, delivery, storage, or financial transaction occurred involving the property.
- c. In the second line of the second paragraph of Comment One, delete “death of serious bodily injury” and substitute “death or serious bodily injury.”

16.01 – Accessing Computer to Obtain by False Pretenses

- a. Change the name of this instruction to “Computer Fraud”
- b. In the body of the instruction, substitute the new language for the existing language. There are numerous changes, so a new “with comments and footnotes” version has been drafted.

16.02 – Accessing, Altering or Contaminating Computer or Computer Security Device Without Authorization

- a. Change the name of this instruction to “Computer Tampering”
- b. In the body of the instruction, substitute the new language for the existing language. There are numerous changes, so a new “with comments and footnotes” version has been drafted.

16.03 – Receiving, Concealing, Using or Aiding Another in Receiving, Concealing or Using Proceeds from Computer Crimes

- a. Change the name of this instruction to “Receiving, Concealing Or Using Proceeds Resulting From Computer [*Fraud*] [*Tampering*]”
- b. In the body of the instruction, substitute the new language for the existing language. There are numerous changes, so a new “with comments and footnotes” version has been drafted.

20.02 – Bigamy

- a. Delete the text of element 3 of Part A and substitute the following: that the defendant purported [*to marry*] **[only for offenses committed on or after 7/1/13: [*to be married to*]]** a person other than [*his*] [*her*] spouse in this state under circumstances that would, if [*he*] [*she*] were not already married, constitute a marriage;
- b. Delete the text of element 1 of Part B and substitute the following: that the defendant purported [*to marry*] **[only for offenses committed on or after 7/1/13: [*to be married to*]]** a person other than [*his*] [*her*] spouse;
- c. Delete the text of Comment 1 and substitute the following: Bigamy is a Class A misdemeanor. T.C.A. § 39-15-301(c). For offenses occurring on or after 7/1/13, the maximum fine is five thousand dollars (\$5,000). T.C.A. § 39-15-301(d).

21.01(a) – Agg Child Abuse and Neglect (prior to 7/1/05)

- a. Immediately after the word “defendant” in the first line of element (1) on page 645, add a footnote that states: If the trial judge is considering trying two or more defendants at the same time, see Comment 5.
- b. Create a new Comment 5. The new comment will have the following text:

If the trial judge is considering trying two or more defendants for this offense at the same time, the judge should become familiar with the issues raised in *State v. Gomez*, 367 S.W.3d 237 (Tenn. 2012) and the perils encountered when one defendant attempts to garner character proof from another co-defendant, whose credibility is then impeached by knowledge of prior bad acts of the defendant. The Court “underscores the difficulty in pursuing joint trials for co-defendants who are charged with abuse of a child. Although we decline to require the severance of the trials of defendants in [child abuse/neglect/endangerment] cases, trial courts should give motions to sever serious consideration when such motions are made.” *Id.* at 246 n. 7.

The Court also held that “when a trial court permits cross-examination of a [co-defendant] character witness concerning specific instances of a defendant’s conduct, the trial court must provide an instruction limiting consideration of the evidence for the purpose of evaluating the character witness’s credibility. *State v. Nesbit*, 978 S.W.2d 872, 883 (Tenn. 1998).” *Gomez* at 247. To that end, the trial judge may wish to utilize a modified form of T.P.I. -- Crim. 42.10, Evidence of other crimes.

21.01(b) – Agg Child [Abuse] [Neglect or Endangerment] (on or after 7/1/05 but prior to 7/1/09)

- a. Immediately after the word “defendant” in the first line of element (1) of Part A **AND** Part B on pages 648 and 649, add a footnote that states: If the trial judge is considering trying two or more defendants at the same time, see Comment 4.
- b. Create a new Comment 4. The new comment will have the following text:

If the trial judge is considering trying two or more defendants for this offense at the same time, the judge should become familiar with the issues raised in *State v. Gomez*, 367 S.W.3d 237 (Tenn. 2012) and the perils encountered when one defendant attempts to garner character proof from another co-defendant, whose credibility is then impeached by knowledge of prior bad acts of the defendant. The Court “underscores the difficulty in pursuing joint trials for co-defendants who are charged with abuse of a child. Although we decline to require the severance of the trials of defendants in [child abuse/neglect/endangerment] cases, trial courts should give motions to sever serious consideration when such motions are made.” *Id.* at 246 n. 7.

The Court also held that “when a trial court permits cross-examination of a [co-defendant] character witness concerning specific instances of a defendant's conduct, the trial court must provide an instruction limiting consideration of the evidence for the purpose of evaluating the character witness's credibility. *State v. Nesbit*, 978 S.W.2d 872, 883 (Tenn. 1998).” *Gomez* at 247. To that end, the trial judge may wish to utilize a modified form of T.P.I. -- Crim. 42.10, Evidence of other crimes.

21.01(c) – Agg Child [Abuse] [Neglect] (on or after 7/1/09)

- a. In element (1) of Part A **AND** Part B, delete “under eighteen (18) years of age”
- b. In the definition of “serious bodily injury” on p. 656, delete the bracket that appears after “objects” and before the period in the 12th line of the definition. Also, insert brackets around “or a broken bone of a child who is eight (8) years of age or less” in lines 5 and 6 of the definition.
- c. Add the following text to the end of Comment 1: For an offense of aggravated child neglect committed on or after 7/1/13, the defendant must serve 70% of the sentence imposed less sentence credits earned and retained, and no credits can reduce the release eligibility below 55%. T.C.A. § 40-35-501(k).
- d. In element (1) of Part A, insert a footnote after the comma that follows “accidental means.” The text of the footnote will be the same as the text of footnote 3 of 21.01(b) on p. 648.
- e. Immediately after the word “defendant” in the first line of element (1) in Part A **AND** Part B on pages 653 and 654, add a footnote that states: If the trial judge is considering trying two or more defendants at the same time, see Comment 3.
- f. Create a new Comment 3. The new comment will have the following text:

If the trial judge is considering trying two or more defendants for this offense at the same time, the judge should become familiar with the issues raised in *State v. Gomez*, 367 S.W.3d 237 (Tenn. 2012) and the perils encountered when one defendant attempts to garner character proof from another co-defendant, whose credibility is then impeached by knowledge of prior bad acts of the defendant. The Court “underscores the difficulty in pursuing joint trials for co-defendants

who are charged with abuse of a child. Although we decline to require the severance of the trials of defendants in [child abuse/neglect/endangerment] cases, trial courts should give motions to sever serious consideration when such motions are made." *Id.* at 246 n. 7.

The Court also held that "when a trial court permits cross-examination of a [co-defendant] character witness concerning specific instances of a defendant's conduct, the trial court must provide an instruction limiting consideration of the evidence for the purpose of evaluating the character witness's credibility. *State v. Nesbit*, 978 S.W.2d 872, 883 (Tenn. 1998)." *Gomez* at 247. To that end, the trial judge may wish to utilize a modified form of T.P.I. -- Crim. 42.10, Evidence of other crimes.

21.02(a) – Child Abuse and Neglect (prior to 7/1/05)

- a. Immediately after the word "defendant" in the first line of element (1) on page 659, add a footnote that states: If the trial judge is considering trying two or more defendants at the same time, see Comment 6.
- b. Create a new Comment 6. The new comment will have the following text:

If the trial judge is considering trying two or more defendants for this offense at the same time, the judge should become familiar with the issues raised in *State v. Gomez*, 367 S.W.3d 237 (Tenn. 2012) and the perils encountered when one defendant attempts to garner character proof from another co-defendant, whose credibility is then impeached by knowledge of prior bad acts of the defendant. The Court "underscores the difficulty in pursuing joint trials for co-defendants who are charged with abuse of a child. Although we decline to require the severance of the trials of defendants in [child abuse/neglect/endangerment] cases, trial courts should give motions to sever serious consideration when such motions are made." *Id.* at 246 n. 7.

The Court also held that "when a trial court permits cross-examination of a [co-defendant] character witness concerning specific instances of a defendant's conduct, the trial court must provide an instruction limiting consideration of the evidence for the purpose of evaluating the character witness's credibility. *State v. Nesbit*, 978 S.W.2d 872, 883 (Tenn. 1998)." *Gomez* at 247. To that end, the trial judge may wish to utilize a modified form of T.P.I. -- Crim. 42.10, Evidence of other crimes.

21.02(b) – Child [Abuse] [Neglect] (on or after 7/1/05)

- a. Immediately after the word "defendant" in the first line of element (1) in Part A **AND** Part B on page 662, add a footnote that states: If the trial judge is considering trying two or more defendants at the same time, see Comment 6.
- b. Create a new Comment 6. The new comment will have the following text:

If the trial judge is considering trying two or more defendants for this offense at the same time, the judge should become familiar with the issues raised in *State v. Gomez*, 367 S.W.3d 237 (Tenn. 2012) and the perils encountered when one defendant attempts to garner character proof from another co-defendant, whose credibility is then impeached by knowledge of prior bad acts of the defendant. The Court "underscores the difficulty in pursuing joint trials for co-defendants who are charged with abuse of a child. Although we decline to require the severance of the trials of defendants in [child abuse/neglect/endangerment] cases, trial courts should give motions to sever serious consideration when such motions are made." *Id.* at 246 n. 7.

The Court also held that "when a trial court permits cross-examination of a [co-defendant] character witness concerning specific instances of a defendant's conduct, the trial court must provide an instruction limiting consideration of the evidence for the purpose of evaluating the character witness's credibility. *State v. Nesbit*, 978 S.W.2d 872, 883 (Tenn. 1998)." *Gomez* at 247. To that end, the trial judge may wish to utilize a modified form of T.P.I. -- Crim. 42.10, Evidence of other crimes.

21.03(a) – Parental or Custodial Child Endangerment

- a. Immediately after the word "defendant" in the first line of element (1) on page 666, add a footnote that states: If the trial judge is considering trying two or more defendants at the same time, see Comment 3.
- b. Create a new Comment 3. The new comment will have the following text:

If the trial judge is considering trying two or more defendants for this offense at the same time, the judge should become familiar with the issues raised in *State v. Gomez*, 367 S.W.3d 237 (Tenn. 2012) and the perils encountered when one defendant attempts to garner character proof from another co-defendant, whose credibility is then impeached by knowledge of prior bad acts of the defendant. The Court "underscores the difficulty in pursuing joint trials for co-defendants who are charged with abuse of a child. Although we decline to require the severance of the trials of defendants in [child abuse/neglect/endangerment] cases, trial courts should give motions to sever serious consideration when such motions are made." *Id.* at 246 n. 7.

The Court also held that "when a trial court permits cross-examination of a [co-defendant] character witness concerning specific instances of a defendant's conduct, the trial court must provide an instruction limiting consideration of the evidence for the purpose of evaluating the character witness's credibility. *State v. Nesbit*, 978 S.W.2d 872, 883 (Tenn. 1998)." *Gomez* at 247. To that end, the trial judge may wish to utilize a modified form of T.P.I. -- Crim. 42.10, Evidence of other crimes.

21.03(b) – Aggravated Parental or Custodial Child Endangerment

- a. Add the following text to the end of Comment 1: For an offense of aggravated parental or custodial child endangerment committed on or after 7/1/13, the defendant must serve 70% of the sentence imposed less sentence credits earned and retained, and no credits can reduce the eligibility below 55%. T.C.A. § 40-35-501(k).
- b. Immediately after the word "defendant" in the first line of element (1) on page 668, add a footnote that states: If the trial judge is considering trying two or more defendants at the same time, see Comment 2.
- c. Create a new Comment 2. The new comment will have the following text:

If the trial judge is considering trying two or more defendants for this offense at the same time, the judge should become familiar with the issues raised in *State v. Gomez*, 367 S.W.3d 237 (Tenn. 2012) and the perils encountered when one defendant attempts to garner character proof from another co-defendant, whose credibility is then impeached by knowledge of prior bad acts of the defendant. The Court "underscores the difficulty in pursuing joint trials for co-defendants who are charged with abuse of a child. Although we decline to require the severance of the

trials of defendants in [child abuse/neglect/endangerment] cases, trial courts should give motions to sever serious consideration when such motions are made." *Id.* at 246 n. 7.

The Court also held that "when a trial court permits cross-examination of a [co-defendant] character witness concerning specific instances of a defendant's conduct, the trial court must provide an instruction limiting consideration of the evidence for the purpose of evaluating the character witness's credibility. *State v. Nesbit*, 978 S.W.2d 872, 883 (Tenn. 1998)." *Gomez* at 247. To that end, the trial judge may wish to utilize a modified form of T.P.I. -- Crim. 42.10, Evidence of other crimes.

25.02 – Official Oppression

- a. Add the following two new paragraphs immediately prior to the definition of "intentionally" on p. 723:

"Knew" means that a person acts knowingly with respect to the conduct or to circumstances surrounding the conduct when the person is aware of the nature of the conduct or that the circumstances exist. A person acts knowingly with respect to a result of the person's conduct when the person is aware that the conduct is reasonably certain to cause the result.

The requirement of "knew" is also established if it is shown that the defendant acted intentionally.

- b. At the end of the first new paragraph, insert a footnote with the following text: T.C.A. § 39-11-106(a)(20).
- c. At the end of the second new paragraph, insert a footnote with the following text: T.C.A. § 39-11-301(a)(2).

29.13(a) – Willful [physical abuse] [gross neglect] of impaired adult resulting in serious harm (for offenses committed prior to 7/1/07)

- a. In the first definition on p. 831, delete "Abuse or neglect" and substitute "[Abuse] [Neglect]"
- b. Insert the following after the definition of "Adult" on pp. 831-32:

"Advanced age" means sixty (60) years of age or older.

- c. Following this new definition insert a footnote with the following text: T.C.A. § 71-6-102(3).
- d. Insert the following after the definition of "Advanced age":

"Caretaker" means an individual or institution who has the responsibility for the care of the adult as a result of family relationship, or who has assumed the responsibility for the care of the adult person voluntarily, or by contract, or agreement. **[only for offenses committed on or after 7/1/04: A financial institution is not a caretaker of funds or other assets unless such financial institution has entered into an agreement to act as a trustee of such property or has been appointed by a court of competent jurisdiction to act as a trustee with regard to the property of the adult.]**
(INSERT FOOTNOTE HERE)

e. After the closing bracket, insert a footnote with the following text: T.C.A. § 71-6-102(5).

f. Insert the following after the definition of “Caretaker”:

“Exploitation” means the improper use by a caretaker of funds that have been paid by a governmental agency to an adult or to the caretaker for the use or care of the adult.

g. After the closing bracket, insert a footnote with the following text: T.C.A. § 71-6-102(8).

h. Insert the following after the definition of “Exploitation”:

“Investigation” includes, but is not limited to, a personal interview with the individual reported to be abused, neglected, or exploited. When abuse or neglect is allegedly the cause of death, a coroner’s or doctor’s report shall be examined as part of the investigation.

i. Following this new definition, insert a footnote with the following text: T.C.A. § 71-6-102(10).

j. Insert the following after the definition of “Investigation”:

“Protective services” means services undertaken by the department of human services for one who is being abused, neglected, or exploited. These services may include, but are not limited to, conducting investigations of complaints of possible abuse, neglect, or exploitation to ascertain whether or not the situation and condition of the adult in need of protective services warrants further action; social services aimed at preventing and remedying abuse, neglect, and exploitation; services directed toward seeking legal determination of whether the adult in need of protective services has been abused, neglected or exploited and procurement of suitable care in or out of the adult’s home.

k. Following this new definition, insert a footnote with the following text: T.C.A. § 71-6-102(11).

29.13(b) – [Physical Abuse] [Gross Neglect] of Impaired Adult, etc. (on or after 7/1/07)

a. Delete the definition of “[Abuse] [Neglect]” on pp. 833-834, substitute the following, and move footnote 4 to the end of this new language:

“[Abuse] [Neglect]” means the infliction of physical pain, injury, or mental anguish, or the deprivation of services by a caretaker that were necessary to maintain the health and welfare of the adult or a situation in which the adult was unable to provide or obtain the services that were necessary to maintain that person’s health or welfare. **[Only for offenses committed on or after 7/1/13:** It also means transporting the adult and knowingly abandoning, leaving or failing to provide additional planned transportation for the adult if the adult’s caretaker knew, or should have known, that the adult was unable to protect or care for *[himself]* *[herself]* without assistance or supervision, and the caretaker’s conduct caused or created a substantial risk of the infliction of physical pain, injury, or mental anguish, or the deprivation of services by a caretaker that would be necessary to maintain the health and welfare of the adult or a situation in which the adult would be unable to provide or obtain the services that would be necessary to maintain that person’s health or welfare.]

b. Insert the following after the definition of “Adult” on p. 834:

“Advanced age” means sixty (60) years of age or older.

- c. Following this new definition insert a footnote with the following text: T.C.A. § 71-6-102(3).
- d. Insert the following after the definition of “Advanced age”:

[Only for offenses committed prior to 7/1/13: “Caretaker” means an individual or institution who has the responsibility for the care of the adult as a result of family relationship, or who has assumed the responsibility for the care of the adult person voluntarily, or by contract, or agreement. [A financial institution is not a caretaker of funds or other assets unless such financial institution has entered into an agreement to act as a trustee of such property or has been appointed by a court of competent jurisdiction to act as a trustee with regard to the property of the adult.]]
(INSERT FOOTNOTE HERE)

or

[Only for offenses committed on or after 7/1/13: “Caretaker”:

[(a) means an individual or institution who has assumed the duty to provide for the care of the adult by contract or agreement;]

[(b) includes a parent, spouse, adult child or other relative, both biological or by marriage, who:

(i) resides with or in the same building with or regularly visits the adult;

(ii) knows or reasonably should know of the adult’s mental or physical dysfunction or advanced age; and

(iii) knows or reasonably should know that the adult is unable to adequately provide for the adult’s own care;] and

[(c) does not mean a financial institution as a caretaker of funds or other assets unless such financial institution has entered into an agreement to act as a trustee of such property or has been appointed by a court of competent jurisdiction to act as a trustee with regard to the property of the adult.]] (INSERT FOOTNOTE HERE)

- e. After the closing bracket in the first definition of “caretaker” insert a footnote with the following text: T.C.A. § 71-6-102(5) (Supp. 2012). After the closing bracket in the second definition of “caretaker” insert a footnote with the following text: T.C.A. § 71-6-102(5).
- f. Insert the following after the definition of “Caretaker”:

“Exploitation” means the improper use by a caretaker of funds that have been paid by a governmental agency to an adult or to the caretaker for the use or care of the adult.

- g. After the closing bracket, insert a footnote with the following text: T.C.A. § 71-6-102(8).
- h. Insert the following after the definition of “Exploitation”:

“Investigation” includes, but is not limited to, a personal interview with the individual reported to be abused, neglected, or exploited. When abuse or neglect is allegedly the cause of death, a coroner’s or doctor’s report shall be examined as part of the investigation.

- i. Following this new definition, insert a footnote with the following text: T.C.A. § 71-6-102(10).
- j. Insert the following after the definition of “Investigation”:

“Protective services” means services undertaken by the department of human services for one who is being abused, neglected, or exploited. These services may include, but are not limited to, conducting investigations of complaints of possible abuse, neglect, or exploitation to ascertain whether or not the situation and condition of the adult in need of protective services warrants further action; social services aimed at preventing and remedying abuse, neglect, and exploitation; services directed toward seeking legal determination of whether the adult in need of protective services has been abused, neglected or exploited and procurement of suitable care in or out of the adult's home.

- k. Following this new definition, insert a footnote with the following text: T.C.A. § 71-6-102(11).

29.14(a) – Willful [abuse] [neglect] [exploitation] of adult (prior to 6/11/07)

- a. In the first definition on p. 835, delete “Abuse or neglect” and substitute “[Abuse] [Neglect]”
- b. Insert the following after the definition of “Adult” on p. 835:

“Advanced age” means sixty (60) years of age or older.

- c. Following this new definition insert a footnote with the following text: T.C.A. § 71-6-102(3).
- d. Insert the following after the definition of “Advanced age”:

“Caretaker” means an individual or institution who has the responsibility for the care of the adult as a result of family relationship, or who has assumed the responsibility for the care of the adult person voluntarily, or by contract, or agreement. **[only for offenses committed on or after 7/1/04: A financial institution is not a caretaker of funds or other assets unless such financial institution has entered into an agreement to act as a trustee of such property or has been appointed by a court of competent jurisdiction to act as a trustee with regard to the property of the adult.]**
(INSERT FOOTNOTE HERE)

- e. After the closing bracket, insert a footnote with the following text: T.C.A. § 71-6-102(5).
- f. Insert the following after the existing definition of “Exploitation” on p. 836:

“Investigation” includes, but is not limited to, a personal interview with the individual reported to be abused, neglected, or exploited. When abuse or neglect is allegedly the cause of death, a coroner's or doctor's report shall be examined as part of the investigation.

- g. Following this new definition, insert a footnote with the following text: T.C.A. § 71-6-102(10).
- h. Insert the following after the definition of “Investigation”:

“Protective services” means services undertaken by the department of human services for one who is being abused, neglected, or exploited. These services may include, but are not limited to, conducting investigations of complaints of possible abuse, neglect, or exploitation to ascertain whether or not the situation and condition of the adult in need of protective services warrants further action; social services aimed at preventing and remedying abuse, neglect, and exploitation; services directed toward seeking legal determination of whether the adult in need of

protective services has been abused, neglected or exploited and procurement of suitable care in or out of the adult's home.

- i. Following this new definition, insert a footnote with the following text: T.C.A. § 71-6-102(11).

29.14(b) – [Abuse] [Neglect] [Exploitation] of Adult (on or after 6/11/07)

- a. In element (1), insert a footnote after the comma that follows “other than by accidental means”. The text of the comma will be the same as the text of footnote 2 in 29.13(b) on p. 833.
- b. Delete the definition of “Abuse or neglect” on p. 837, substitute the following, and move footnote 3 to the end of this new language:

“*[Abuse][Neglect]*” means the infliction of physical pain, injury, or mental anguish, or the deprivation of services by a caretaker that were necessary to maintain the health and welfare of the adult or a situation in which the adult was unable to provide or obtain the services that were necessary to maintain that person's health or welfare. **[Only for offenses committed on or after 7/1/13:** It also means transporting the adult and knowingly abandoning, leaving or failing to provide additional planned transportation for the adult if the adult's caretaker knew, or should have known, that the adult was unable to protect or care for *[himself]* *[herself]* without assistance or supervision, and the caretaker's conduct caused or created a substantial risk of the infliction of physical pain, injury, or mental anguish, or the deprivation of services by a caretaker that would be necessary to maintain the health and welfare of the adult or a situation in which the adult would be unable to provide or obtain the services that would be necessary to maintain that person's health or welfare.]

- c. Insert the following after the definition of “Adult” on p. 837:

“Advanced age” means sixty (60) years of age or older.

- d. Following this new definition insert a footnote with the following text: T.C.A. § 71-6-102(3).
- e. Insert the following after the definition of “Advanced age”:

[Only for offenses committed prior to 7/1/13: “Caretaker” means an individual or institution who has the responsibility for the care of the adult as a result of family relationship, or who has assumed the responsibility for the care of the adult person voluntarily, or by contract, or agreement. [A financial institution is not a caretaker of funds or other assets unless such financial institution has entered into an agreement to act as a trustee of such property or has been appointed by a court of competent jurisdiction to act as a trustee with regard to the property of the adult.]]
(INSERT FOOTNOTE HERE)

or

[Only for offenses committed on or after 7/1/13: “Caretaker”:

[(a) means an individual or institution who has assumed the duty to provide for the care of the adult by contract or agreement;]

[(b) includes a parent, spouse, adult child or other relative, both biological or by marriage, who:
(i) resides with or in the same building with or regularly visits the adult;

- (ii) knows or reasonably should know of the adult’s mental or physical dysfunction or advanced age; and
 - (iii) knows or reasonably should know that the adult is unable to adequately provide for the adult’s own care;] and
- [(c) does not mean a financial institution as a caretaker of funds or other assets unless such financial institution has entered into an agreement to act as a trustee of such property or has been appointed by a court of competent jurisdiction to act as a trustee with regard to the property of the adult].] (INSERT FOOTNOTE HERE)
- f. After the closing bracket in the first definition of “caretaker” insert a footnote with the following text: T.C.A. § 71-6-102(5) (Supp. 2012). After the closing bracket in the second definition of “caretaker” insert a footnote with the following text: T.C.A. § 71-6-102(5).
- g. Insert the following after the definition of “Exploitation” on p. 838:

“Investigation” includes, but is not limited to, a personal interview with the individual reported to be abused, neglected, or exploited. When abuse or neglect is allegedly the cause of death, a coroner’s or doctor’s report shall be examined as part of the investigation.
- h. Following this new definition, insert a footnote with the following text: T.C.A. § 71-6-102(10).
- i. Insert the following after the definition of “Investigation”:

“Protective services” means services undertaken by the department of human services for one who is being abused, neglected, or exploited. These services may include, but are not limited to, conducting investigations of complaints of possible abuse, neglect, or exploitation to ascertain whether or not the situation and condition of the adult in need of protective services warrants further action; social services aimed at preventing and remedying abuse, neglect, and exploitation; services directed toward seeking legal determination of whether the adult in need of protective services has been abused, neglected or exploited and procurement of suitable care in or out of the adult’s home.
- j. Following this new definition, insert a footnote with the following text: T.C.A. § 71-6-102(11).

30.12(a) – Stalking (on or after 7/1/05)

- a. Add the following after element (2):

[For offenses committed on or after 5/21/12: and

(3) that the defendant, at the time of the offense, was required to or was registered with the Tennessee Bureau of Investigation as a sexual offender, violent sexual offender or violent juvenile sexual offender, as defined in § 40-39-202.]
- b. Add a footnote after the closing bracket of this new text. The text of the footnote will be as follows: See Comment 2.
- c. Insert a new Comment 2 with the following text: If the indictment charges this element and the trial judge finds that proof of this element may violate Tenn. R. Evid. 404(b), the trial judge may wish to bifurcate this part of the trial and charge this element in a supplemental instruction patterned after an amended version of T.P.I. – Crim. 31.05(a) after the second phase of the trial.

- d. Add the following text to the end of Comment One: For offenses committed on or after 5/21/12, stalking is a Class E felony if the defendant, at the time of the offense, was required to or was registered with the Tennessee Bureau of Investigation as a sexual offender, violent sexual offender or violent juvenile sexual offender. T.C.A. § 39-17-315(b)(3).

31.03 – Unlawful Drug Paraphernalia Uses and Activities

- a. In the definition section on p. 924, add the language below to the end of the definition for “Drug paraphernalia.” Footnote 7 should be moved to the end of this new language AND the text of footnote 7 should be changed to “T.C.A. § 39-17-402(12).” The new language that is being added to the drug paraphernalia definition is as follows:
“Drug paraphernalia” includes, but is not limited to:
- (A) Isomerization devices used, intended for use, or designed for use in increasing the potency of any species of plant that is a controlled substance;
 - (B) Testing equipment used, intended for use, or designed for use in identifying, or in analyzing the strength, effectiveness or purity of controlled substances; and
 - (C) Objects used, intended for use, or designed for use in ingesting, inhaling, or otherwise introducing marijuana, cocaine, hashish, or hashish oil into the human body, such as:
 - (i) Metal, acrylic, glass, stone, or plastic pipes with or without screens, permanent screens, hashish heads, or punctured metal bowls;
 - (ii) Water pipes;
 - (iii) Carburetion tubes and devices;
 - (iv) Smoking and carburetion masks;
 - (v) Chamber pipes;
 - (vi) Carburetor pipes;
 - (vii) Electric pipes;
 - (viii) Chillums;
 - (ix) Bongs; and
 - (x) Ice pipes or chillers.
- b. In a new paragraph immediately following this expanded definition of “drug paraphernalia” add the following text:

In determining whether a particular object is drug paraphernalia as defined above, the jury shall, in addition to all other logically relevant factors, consider the following:

- (1) Statements by the owner or anyone in control of the object concerning its use;
 - [(2) Prior convictions, if any, of the owner or of anyone in control of the object for violation of any state or federal law relating to controlled substances or controlled substance analogues;]
 - (3) The existence of any residue of controlled substances or controlled substance analogues on the object;
 - (4) Instructions, oral or written, provided with the object concerning its use;
 - (5) Descriptive materials accompanying the object that explain or depict its use;
 - (6) The manner in which the object is displayed for sale;
 - (7) The existence and scope of legitimate uses for the object in the community; and
 - (8) Expert testimony concerning its use.
- c. Immediately following the closing bracket after element (2) of this new section, add a footnote with the following text: T.C.A. § 39-17-424. The trial judge may wish to remove factor (2) if not applicable, renumbering the remaining factors accordingly, or have a Tenn. R. Evid. 404(b)

hearing prior to charging factor (2) and allowing introduction of prior convictions of the defendant.

31.05 – Simple Possession

- a. Add the following new paragraph as the final paragraph of this instruction following the definition of “intentionally”: [It is an exception to this offense that the controlled substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of professional practice. (INSERT A FOOTNOTE) If the defendant proves this exception by a preponderance of the evidence,(INSERT FOOTNOTE) you must find *[him]* *[her]* not guilty.]
- b. The first footnote in this new paragraph will have the following text: T.C.A. § 39-17-418(a)
- c. The second footnote in this new paragraph will have the following text: T.C.A. § 39-11-202(b)(2). The trial judge should utilize T.P.I. – CRIM. 42.01, Preponderance of Evidence.

31.11(a) – Prescription Drug Fraud

- a. New instruction

31.20 – Controlled Substance Analogue

- a. On p. 977, add brackets around option “(C)” near the top of the page. Immediately following the closing bracket, which should appear between the semi-colon and the word “and” add a footnote with the following text: T.C.A. § 39-17-424. The trial judge may wish to remove factor (2) if not applicable, renumbering the following factors accordingly, or have a Tenn. R. Evid. 404(b) hearing prior to charging factor (2) and allowing introduction of prior convictions of the defendant.
- b. In the first paragraph of this instruction, add the following (in italics) after “[casually exchanged]”: *[represented]* *[advertised]* *[inferred]*
- c. Delete the definition of “controlled substance analogue” on p. 976 and substitute the text below. DO NOT delete the paragraph that begins “Controlled substance analogue” does not include . . .”:

[Only for offenses committed prior to 7/1/13: “Controlled substance analogue” means a capsule, pill, powder, product or other substance, however constituted:

(A) That has the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance; and

(B) The chemical structure of which is a derivative of, or substantially similar to, the chemical structure of a controlled substance.]

or

[Only for offenses committed on or after 7/1/13: “Controlled substance analogue” means a capsule, pill, powder, product or other substance, however constituted, that has the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance; and has a chemical structure which is a derivative or structural analogue of the chemical structure of a controlled substance, and the structure of the tested item differs in no more than two (2) atoms, one (1) functional group, or one (1) double bond, from the structure of a controlled substance.]

31.21 – Controlled Substance Analogues: Unlawful Representation, Advertisement or Inference

- a. New instruction.

34.03(b) – Sexual Exploitation of a Minor (Offenses Committed on or after 7/1/05)

- a. Insert the following as a new paragraph at the end of the instruction but prior to the Comments section: [**Only for offenses committed on or after 7/1/13:** It is not a defense that the minor victim consented to the conduct that constituted the offense.]
- b. Insert a footnote with the following text after the closing bracket in this new language: T.C.A. § 39-13-1003(f). The Committee is of the opinion that even though the legislature enacted this language for offenses committed on or after 7/1/13, this does not necessarily mean that consent would be a defense for offenses committed prior to that date.

34.04 – Aggravated Sexual Exploitation of a Minor

- a. Insert the following as a new paragraph at the end of the instruction but prior to the Comments section: [**Only for offenses committed on or after 7/1/13:** It is not a defense that the minor victim consented to the conduct that constituted the offense.]
- b. Insert a footnote with the following text after the closing bracket in this new language: T.C.A. § 39-13-1004(e). The Committee is of the opinion that even though the legislature enacted this language for offenses committed on or after 7/1/13, this does not necessarily mean that consent would be a defense for offenses committed prior to that date.

34.05 – Especially Aggravated Sexual Exploitation of a Minor

- a. Insert the following as a new paragraph at the end of the instruction but prior to the Comments section: [**Only for offenses committed on or after 7/1/13:** It is not a defense that the minor victim consented to the conduct that constituted the offense.]
- b. Insert a footnote with the following text after the closing bracket in this new language: T.C.A. § 39-13-1005(g). The Committee is of the opinion that even though the legislature enacted this language for offenses committed on or after 7/1/13, this does not necessarily mean that consent would be a defense for offenses committed prior to that date.

34.09 – Exploitation of a Minor [By Electronic Means]

- a. Insert the following as a new paragraph at the end of the instruction but prior to the Comments section: [**Only for offenses committed on or after 7/1/13:** It is not a defense that the minor victim consented to the conduct that constituted the offense.]
- b. Insert a footnote with the following text after the closing bracket of this new language: T.C.A. § 39-13-529(g). The Committee is of the opinion that even though the legislature enacted this language for offenses committed on or after 7/1/13, this does not necessarily mean that consent would be a defense for offenses committed prior to that date.
- c. Insert the following as a new paragraph at the end of the instruction but prior to the Comments section: [**Only for offenses committed on or after 7/1/13:** It is an exception to this offense that the victim was at least fifteen (15) but less than eighteen (18) years of age and the defendant was

no more than four (4) years older than the victim. If the defendant intentionally commanded, hired, induced or caused the victim to commit this offense, this exception does not apply.]

- d. Insert a footnote with the following text after the closing bracket of this new language: T.C.A. § 39-13-529(b)(4).

36.03(a) – Possessing or Carrying Weapons With Intent To Go Armed

- a. In the definition section, delete the six paragraphs that appear after the definition of “recklessly.” Those paragraphs all begin with the phrase, “It is an exception . . .” DO NOT delete the last paragraph of the instruction, which begins, “It is a defense to prosecution . . .”
- b. Add the following as a new comment: The trial court should refer to T.C.A. §§ 39-17-1309(e), and 49-6-815 for defenses (39-11-203) and exceptions (39-11-202) to this offense. If an exception is charged, it should end with the following sentence: “If the defendant proves this exception by a preponderance of the evidence, you must find [him] [her] not guilty.” The trial judge also should utilize T.P.I. Crim. 42.01, Preponderance of evidence.

36.03(b) – Possessing or Carrying Firearms on School Property

- a. In the definition section, delete the seven paragraphs that appear after the definition of “recklessly.” Those paragraphs all begin with the phrase, “It is an exception . . .” DO NOT delete the last paragraph of the instruction, which begins, “It is a defense to prosecution . . .”
- b. Add the following as a new comment: The trial court should refer to T.C.A. §§ 39-17-1309(c), 39-17-1309(e), and 49-6-815 for defenses (39-11-203) and exceptions (39-11-202) to this offense. If an exception is charged, it should end with the following sentence: “If the defendant proves this exception by a preponderance of the evidence, you must find [him] [her] not guilty.” The trial judge also should utilize T.P.I. Crim. 42.01, Preponderance of evidence.

36.06(c) – Unlawful [Possession] [Employment] of a Firearm, etc.

- a. In element (2) of Part A AND Part B, delete “39-17-1324(i)(1))” and substitute “39-17-1324(i)(1) – see Comment Two)”
- b. Add the following text as a second paragraph in Comment 2: When a dangerous felony has a lesser included offense which is also a dangerous felony or when more than one dangerous felony is alleged, the trial judge should take steps to ensure a unanimous verdict including, but not limited to, giving the jury a verdict form which requires the jury to indicate which dangerous felony it has agreed upon.

36.08 – Carrying Weapon with Intent to go Armed

- a. Delete Comment 2 and substitute the following: The trial court should refer to T.C.A. §§ 39-17-1307(e), 39-17-1308, 39-17-1315 and 39-17-1364 for defenses (39-11-203) and exceptions (39-11-202) to this offense. If an exception is charged, it should end with the following sentence: “If the defendant proves this exception by a preponderance of the evidence, you must find [him] [her] not guilty.” The trial judge also should utilize T.P.I. Crim. 42.01, Preponderance of evidence.

38.01(b) – DUI, etc. (on or after 1/1/11)

- a. In the title of this instruction, insert “but prior to 7/1/13” immediately after “for offenses committed on or after 1/1/11”
- b. Add a footnote at the end of the title of this instruction. The text of the footnote will be as follows: The committee is in the process of drafting a new DUI instruction for offenses committed on or after July 1, 2013. When the committee finalizes the instruction it will be posted on the AOC’s website at <http://www.tncourts.gov/administration/judicial-resources/pattern-jury-instructions/updates-instructions>.

38.02 – Driving Under Influence: Lawful Use Not Defense

- a. The committee substantially revised this instruction, so the AOC is providing a “with comments and footnotes” version. Treat this as if it is a new instruction.

38.19 – Violation of Financial Responsibility Law

- a. In element (1), delete (1)(b) and substitute (b). The substantive text of the element will not change. This is merely a numbering issue.
- b. Insert the following after element (1)(b) (now just (b)) but prior to the “and” that appears between (1)(b) and (2)

[or

(c) **Only for offenses committed on or after 7/1/13:** that the defendant was involved in an accident occurring upon a highway or the premises of a shopping center, trailer park or apartment house complex, or any other premises which are generally frequented by the public at large, which resulted in injury to or death of any person, and the defendant was at fault for the accident by acting with criminal negligence in the operation of the defendant’s motor vehicle;]

- c. Add the following to the definition section after the definition of “motor vehicle” but before the “Comments” section: [“Criminal negligence” means that a person acts with criminal negligence with respect to the circumstances surrounding the person’s conduct or the result of that conduct when the person ought to be aware of a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the accused person’s standpoint.]
- d. Following the closing bracket of this new definition, insert a footnote with the following text: T.C.A. § 39-11-106(a)(4).
- e. Add the following to the end of Comment 1: For offenses committed on or after 7/1/13 involving an accident with death or bodily injury in which the defendant was at fault due to criminal negligence, violation is a Class A misdemeanor.

40.01 – Defense: Ignorance or Mistake of Fact

- a. In Comment 1, delete “effective July 1, 1995. T.C.A. 39-11-502(a) (1995 Supp.)” and substitute the following: if committed on or after 7/1/95, and in prosecutions for patronizing prostitution, T.C.A. § 39-13-514, soliciting sexual exploitation of a minor, T.C.A. § 39-13-529(a), and exploitation of a minor, T.C.A. § 39-13-529(b)(1) and (2), if committed on or after 7/1/13. T.C.A. § 39-11-502.

40.04 – Defense: Entrapment

- a. Add the following language as a new comment:

State v. Blackmon, 78 S.W.3d 322, 331 (Tenn. Crim. App. 2001), provides as follows with regard to the circumstances in which the trial court must instruct on entrapment:

The threshold question of whether the defense of entrapment has been “fairly raised” is for determination by the judge and not the jury. Nonetheless, where the proof fairly raises the issue of entrapment, and the proof is supported by credible evidence, the trial court is required to give the instruction of entrapment whether requested or not. To determine when this statutory defense is fairly raised by the proof so as to require its submission to the jury, a court must, in effect, consider the evidence in the light most favorable to the defendant, including all reasonable inferences flowing from that evidence. *See State v. Bult*, 989 S.W.2d 730, 733 (Tenn. Crim. App. 1998), *perm. to appeal denied*, (Tenn. 1999) (*citing State v. Shropshire*, 874 S.W.2d 634, 639 (Tenn. Crim. App. 1993)). Thus, if entrapment is, in fact, “fairly raised by the proof,” the issue of predisposition becomes a question of fact for the jury. *See also Sherman v. United States*, 356 U.S. at 377, 78 S.Ct. 819.

42.04 – Credibility of Witness: In General and When Defendant Testifying

- a. In the second line of the last paragraph on p. 1319, delete “intrepreter” and substitute “interpreter”

42.04(a) – Alternative Instruction: Credibility of Witness

- a. In the second line of the last paragraph on p.1322, delete “intrepreter” and substitute “interpreter”

42.04(b) – Alternative Instruction: Witness

- a. In the second line of last paragraph prior to the comments on p.1324, delete “intrepreter” and substitute “interpreter”

42.08 – Evidence of Good Character

- a. Insert the following new paragraph at the end of this instruction: [A character witness has been cross-examined about [his] [her] knowledge of [prior crimes] [instances of bad conduct] [dishonest acts] alleged to have been committed by the defendant. You may consider these questions and the witness’s answers only for the purpose of evaluating the witness’s credibility and the basis of knowledge upon which the witness bases [his] [her] character opinion. They cannot be used by you as evidence of the defendant’s guilt of the offense(s) for which [he] [she] is now on trial.]

- b. Following the closing bracket of this new language, insert a footnote with the following text:
State v. Gomez, 367 S.W.3d 237, 247 (Tenn. 2012).

42.08(a) – Alternative Instruction: Character of Defendant

- a. Insert the following new paragraph at the end of this instruction: [A character witness has been cross-examined about *[his] [her]* knowledge of *[prior crimes] [instances of bad conduct] [dishonest acts]* alleged to have been committed by the defendant. You may consider these questions and the witness’s answers only for the purpose of evaluating the witness’s credibility and the basis of knowledge upon which the witness bases *[his] [her]* character opinion. They cannot be used by you as evidence of the defendant’s guilt of the offense(s) for which *[he] [she]* is now on trial.]
- b. Following the closing bracket of this new language, insert a footnote with the following text:
State v. Gomez, 367 S.W.3d 237, 247 (Tenn. 2012).

42.11(a) – Prior Statement of the Defendant

- a. New instruction

43.01 – When Rule 29 Motion for Judgment of Acquittal is Granted in Part

- a. On p.1369, this instruction is reserved. Delete “[Reserved]” from p. 1369 and substitute the new instruction with the title noted above. The AOC is providing you with a “with comments and footnotes” version of the new instruction.

T.P.I. -- CRIM. 4.01(a)

**CRIMINAL ATTEMPT, TO WIT: FIRST DEGREE MURDER WHERE THE
VICTIM SUFFERS SERIOUS BODILY INJURY**

Any person who attempts to commit First Degree Murder where the victim suffers serious bodily injury is guilty of a crime.

For you to find a person guilty of this offense, the state must have proven beyond a reasonable doubt the existence of the following essential elements:¹

(1) that the defendant intended to commit First Degree Murder;

and

(2)(a) that the defendant did some act or caused something to happen that would have constituted First Degree Murder if the defendant's beliefs at the time *[he]* *[she]* acted had in fact been true;

or

(b) that the defendant did some act intending to cause an essential element of First Degree Murder to occur, and at the time believed the act would cause the element to occur without further action on the defendant's part;

or

(c) that the defendant did some act intending to complete a course of action or cause a result that would constitute First Degree Murder under the circumstances, as the defendant believed them to be at the time, and *[his]* *[her]* actions constituted a substantial step toward the commission of First Degree Murder. The defendant's actions do not constitute a substantial step unless the defendant's

entire course of action clearly shows *[his] [her]* intent to commit First Degree Murder;² **[see Comment 2 for instructions as to which of these three sections to use in element 2]**

and

- (3) that the victim suffered serious bodily injury.

["Intended"] ["Intending"] ["Intent"] means that a person acts intentionally when it is the person's conscious objective or desire to cause the death of the alleged victim.³

The essential elements necessary to constitute First Degree Murder are:

- (1) that the defendant unlawfully killed the alleged victim;

and

- (2) that the defendant acted intentionally. A person acts intentionally when it is the person's conscious objective or desire to cause the death of the alleged victim; [A defendant's conscious objective need not be to kill a specific victim. If you find beyond a reasonable doubt that the defendant intended to cause the result, the death of a person, and that *[he] [she]* did so with premeditation, then the killing of another, even if not the intended victim, would be First Degree Murder;]⁴

and

- (3) that the killing was premeditated.

A premeditated act is one done after the exercise of reflection and judgment.

Premeditation means that the intent to kill must have been formed prior to the act itself.

It is not necessary that the purpose to kill preexist in the mind of the accused for any

definite period of time. The mental state of the accused at the time *[he]* *[she]* allegedly decided to kill must be carefully considered in order to determine whether the accused was sufficiently free from excitement and passion as to be capable of premeditation.⁵ If the design to kill was formed with premeditation, it is immaterial that the accused may have been in a state of passion or excitement when the design was carried into effect. Furthermore, premeditation can be found if the decision to kill is first formed during the heat of passion, but the accused commits the act after the passion has subsided.⁶

"Serious bodily injury" means bodily injury that involves a substantial risk of death; protracted unconsciousness; extreme physical pain; protracted or obvious disfigurement; or protracted loss or substantial impairment of a function of a bodily member, organ or mental faculty [or a broken bone of a child who is eight (8) years of age or less].⁷ "Bodily injury" includes a cut, abrasion, bruise, burn or disfigurement, and physical pain or temporary illness or impairment of the function of a bodily member, organ, or mental faculty.⁸

[Any alleged victim includes a human embryo or fetus at any stage of gestation in utero.]⁹

COMMENTS

1. Criminal Attempt, to wit: First Degree Murder where the victim suffers serious bodily injury is a Class A felony, T.C.A. § 39-11-117(a)(2), and the sentence must be served at 85% release eligibility, less sentence reduction credits earned and retained. However, no credits shall reduce the release eligibility below 75%. T.C.A. § 40-35-501(k).
2. The trial judge should always charge element (2)(b) in result of conduct cases. *State v. Elder*, 982 S.W.2d 871 (Tenn. Crim. App. 1998), holds that:

For instructional purposes, it must be recognized that our criminal code has

established three distinct types of criminal attempts:

(1) Intentionally engaging in action or causing a result that would constitute an offense if the circumstances surrounding the conduct were as the person believes them to be. Tenn. Code Ann. § 39-12-101(a)(1). This type of attempt is designed to reject the defense of impossibility. Examples include receiving stolen property that was not, in fact, stolen, attempt to steal from an empty house or empty pocket, offering a bribe to a person believed to be a juror who is not, etc.

(2) Acts with intent to cause a result that is an element of the offense, and believes the conduct will cause the result without further conduct on the person's part. Tenn. Code Ann. § 39-12-101(a)(2). This is the most common type of attempt. Examples would include the intentional or knowing shooting of a victim not resulting in death, an unsuccessful rape, robbery, etc. Both types (1) and (2) deal with situations where the actor has done all he intends to do, but where the crime nevertheless has not been committed.

(3) Acts with intent to complete a course of action or cause a result that would constitute the offense, under the circumstances surrounding the conduct as the person believes them to be, and the conduct constitutes a substantial step toward the commission of the offense. Type three attempts involve those situations where the actor has taken a 'substantial step' in preparing and planning the commission of the offense, yet has not done all that he intends to do. The problem is to distinguish between acts of perpetration (which may not be criminal) and a criminal attempt. In this instance, criminal liability depends upon the actor having taken a 'substantial step' in a corroborated course of conduct planned to culminate in the commission of a crime. Tenn. Code Ann. § 39-12-101(a)(3) and (b); see also MODEL PENAL CODE Criminal Attempt, Section 5.01. Examples would include reconnoitering the place for the commission of the crime, the possession of materials to be employed in the commission of the crime that are specifically designated for such unlawful use or that can serve no lawful purpose of the actor under the circumstances, and lying in wait for the contemplated victim of the crime.

Elder at 875 n. 2. The Sentencing Commission Comments to T.C.A. § 39-12-101, the Criminal Attempt statute, also state that the trial judge may have to charge more than one section, as these three sections are not mutually exclusive.

Subdivisions (a)(1)-(3) are not intended to define mutually exclusive kinds of criminal attempt. Rather, these three subdivisions set out alternative statutory tests for determining if a course of conduct that does not produce a proscribed harm can be classified as an attempt to commit an offense.

Subdivision (a)(1) is directed at a completed course of conduct, while subdivisions (a)(2) and (3) focus on conduct that is incomplete in the sense that it is cut short at some point in time before accomplishment of the intended criminal objective. Thus, a completed course of conduct constituting a criminal attempt under subdivision (a)(1) could also include conduct sufficient to establish attempt responsibility under subdivisions (a)(2) and (3).

3. Renunciation may be asserted as an affirmative defense to criminal attempt under T.C.A. § 39-12-104. If properly raised as an affirmative defense, the trial judge should utilize T.P.I. Crim. 40.10, Affirmative defense: Renunciation.

¹ T.C.A. § 39-12-101(a) and T.C.A. § 39-13-202(a)(1). Although First Degree Murder also can be committed by felony murder as set out in T.C.A. § 39-13-202(a)(2) and (3), attempt to commit felony murder does not exist as an offense in Tennessee. *State v. Kimbrough*, 924 S.W.2d 888 (Tenn. 1996).

² T.C.A. § 39-12-101(b).

³ *State v. Page*, 81 S.W.3d 781, 790-93 (Tenn. Crim. App. 2002) (Appendix).

⁴ *State v. Millen*, 988 S.W.2d 164, 168 (Tenn. 1999), abolishing the doctrine of "transferred intent."

⁵ T.C.A. § 39-13-202(d).

⁶ *State v. Bullington*, 532 S.W.2d 556, 559-60 (Tenn. 1976).

⁷ T.C.A. § 39-11-106(a)(34). The trial judge may wish to omit the language "or a broken bone of a child who is eight (8) years of age or less" if not fairly raised in the proof.

⁸ T.C.A. § 39-11-106(a)(2).

⁹ T.C.A. § 39-13-214.

T.P.I. -- CRIM. 6.02

AGGRAVATED ASSAULT

(for offenses committed on or after 1/1/07 but prior to 7/1/13)¹

Any person who commits the offense of aggravated assault is guilty of a crime.

For you to find the defendant guilty of this offense, the state must have proven beyond a reasonable doubt the existence of the following essential elements:²

[Part A:

(1)(a) that the defendant intentionally or knowingly caused bodily injury to another;

or

(b) that the defendant intentionally or knowingly caused another to reasonably fear imminent bodily injury;

or

(c) that the defendant intentionally or knowingly caused physical contact with another and a reasonable person would regard that contact as extremely offensive or provocative;

and

(2)(a) that the defendant caused serious bodily injury to another;

or

(b) that the defendant used or displayed a deadly weapon;

[or

(c) **only for offenses committed on or after 7/1/11:** that the defendant attempted or intended to cause bodily injury to another by strangulation.]

[and

(3) **only for offenses committed on or after 7/1/09:** that the offense was committed against a law enforcement officer.]

[and

(4) **only for offenses committed on or after 7/1/12:** that the defendant committed the offense while acting in concert with two (2) or more other persons.]]

or

[Part B:

(1) that the defendant was the *[parent or custodian of a child]*
[custodian of an adult];

and

(2)(a) that another person intentionally or knowingly caused bodily injury to the *[child]* *[adult];*

or

(b) that another person intentionally or knowingly caused the *[child]*
[adult] to reasonably fear imminent bodily injury;

or

(c) that another person intentionally or knowingly caused physical contact with the *[child]* *[adult]* and a reasonable person would regard that contact as extremely offensive or provocative;

and

(3)(a) that such person caused serious bodily injury to the *[child]* *[adult]*;

or

(b) that such person used or displayed a deadly weapon;

[or

(c) **only for offenses committed on or after 7/1/11:** that the defendant attempted or intended to cause bodily injury to another by strangulation;]

and

(4) that the defendant intentionally or knowingly failed or refused to protect said *[child]* *[adult]* from the person's actions.]

or

[Part C:

(1) that the defendant was the parent or custodian of a child;

and

(2) that another person did knowingly, other than by accidental means,³ treat such child in such a manner as to inflict injury;

and

(3)(a) that a *[deadly weapon]* *[dangerous instrumentality]* *[controlled substance]* [**only for offenses committed on or after 5/15/12:**

controlled substance analogue] was used to accomplish the act of abuse;

or

(b) that the act of abuse resulted in serious bodily injury to the child;

or

(c) that the act of abuse *[was especially heinous, atrocious or cruel]*
[involved the infliction of torture to the victim];

[or

(d) **only for offenses committed on or after 7/1/11:** that the act of abuse resulted from the knowing exposure of the child to the initiation of a process intended to result in the manufacture of methamphetamine;]

and

(4) that the defendant intentionally or knowingly failed or refused to protect said child from the act of abuse.]

or

[Part D:

(1) that the defendant was the *[parent or custodian of a child]*
[custodian of an adult];

and

(2) that another person recklessly caused bodily injury to the *[child]*
[adult];

and

(3)(a) that such bodily injury was serious;

or

(b) that the person used or displayed a deadly weapon;

and

(4) that the defendant intentionally or knowingly failed or refused to protect said *[child]* *[adult]* from the person's actions.]

or

[Part E:

(1)(a) that the defendant intentionally or knowingly caused or attempted to cause bodily injury to the alleged victim;

or

(b) that the defendant intentionally or knowingly committed or attempted to commit an assault against the alleged victim;

and

(2) that the defendant did so after knowing the defendant had been enjoined or restrained by *[an order]* *[a diversion agreement]* *[a probation order]* of a court of competent jurisdiction from *[causing or attempting to cause bodily injury to]* *[committing or attempting to commit an assault against]* the alleged victim.

[and

(3) **only for offenses committed on or after 7/1/09:** that the offense was committed against a law enforcement officer.]]

or

[Part F:

(1) that the defendant recklessly caused bodily injury to another;

and

(2)(a) that such bodily injury was serious;

or

(b) that the defendant used or displayed a deadly weapon.

[and

(3) **only for offenses committed on or after 7/1/09:** that the offense was committed against a law enforcement officer.]

[and

(4) **only for offenses committed on or after 7/1/12:** that the defendant committed the offense while acting in concert with two (2) or more other persons.]]

or

[Part G (**only for offenses committed on or after 6/9/09**):

(1) that the defendant intended to cause physical injury to *[a public employee] [an employee of a public or private transportation system];*

and

(2) that the defendant caused physical injury to such employee while the *[public employee was performing a duty within the scope of the employee's employment] [while the transportation system*

employee was performing an assigned duty on, or directly related to, the operation of a transit vehicle].]

[The trial judge may wish to charge T.P.I. – Crim. 4.01, Criminal Attempt, in appropriate fact situations.]

[“Acting in concert” means such conduct that would make one criminally responsible for committing or facilitating the offense.]⁴ [If this definition is charged, the trial judge should utilize T.P.I. – Crim. 3.01, Criminal Responsibility and T.P.I. – Crim. 3.02, Facilitation.]

[["Bodily injury"] ["Injury"] includes a cut, abrasion, bruise, burn or disfigurement, and physical pain or temporary illness or impairment of the function of a bodily member, organ, or mental faculty.]⁵

[“Child” means a person under eighteen (18) years of age.]⁶

[“Controlled substance” means a drug, substance, or immediate precursor in Schedules I through VII of §§ 39-17-403 — 39-17-416. [_____] is a [drug] [substance] [immediate precursor] in Schedules I through VII of §§ 39-17-403 — 39-17-416.]

[[_____] is a controlled substance analogue.]⁷

[only for offenses committed on or after 7/1/09: A “dangerous instrumentality” is any item that in the manner of its use or intended use as applied to a child is capable of producing serious bodily injury to a child.]⁸

[“Deadly weapon” means a firearm or anything manifestly designed, made, or adapted for the purpose of inflicting death or serious bodily injury or anything that in the manner of its use or intended use is capable of causing death

or serious bodily injury.]]⁹

["Heinous" means grossly wicked or reprehensible, abominable; odious; vile. "Atrocious" means extremely evil or cruel; monstrous; exceptionally bad; abominable. "Cruel" means disposed to inflict pain or suffering; causing suffering; painful.]]¹⁰

["Law enforcement officer" means an officer, employee or agent of government who has a duty imposed by law to:

(A) Maintain public order;

or

(B) Make arrests for offenses, whether that duty extends to all offenses or is limited to specific offenses;

and

(C) Investigate the commission or suspected commission of offenses.]]¹¹

["Physical injury" includes a cut, abrasion, bruise, burn or disfigurement, and physical pain or temporary illness or impairment of the function of a bodily member, organ, or mental faculty.]]¹²

["Public employee" means any person providing services for the state of Tennessee, state agencies, counties, municipalities, or subdivisions of such governmental bodies in Tennessee for which compensation is paid.]]¹³

["Serious bodily injury" means bodily injury that involves a substantial risk of death; protracted unconsciousness; extreme physical pain; protracted or obvious disfigurement; or protracted loss or substantial impairment of a function

of a bodily member, organ or mental faculty [**only for offenses committed on or after 7/1/09:** or a broken bone of a child who is eight (8) years of age or less].]¹⁴

["Bodily injury" includes a cut, abrasion, bruise, burn or disfigurement, and physical pain or temporary illness or impairment of the function of a bodily member, organ, or mental faculty.]"¹⁵

[only applicable if court instructs jury under Part C of this instruction: ["Serious bodily injury" means bodily injury that involves a substantial risk of death; protracted unconsciousness; extreme physical pain; protracted or obvious disfigurement; or protracted loss or substantial impairment of a function of a bodily member, organ or mental faculty **[only for offenses committed on or after 7/1/09:** or a broken bone of a child who is eight (8) years of age or less]. **[only for offenses committed on or after 7/1/09:** Serious bodily injury to the child includes, but is not limited to, second or third degree burns, a fracture of any bone, a concussion, subdural or subarachnoid bleeding, retinal hemorrhage, cerebral edema, brain contusion, injuries to the skin that involve severe bruising or the likelihood of permanent or protracted disfigurement including those sustained by whipping children with objects.]"¹⁶ ["Bodily injury" includes a cut, abrasion, bruise, burn or disfigurement, and physical pain or temporary illness or impairment of the function of a bodily member, organ, or mental faculty.]"¹⁷]

["Strangulation" means intentionally impeding normal breathing or circulation of the blood by applying pressure to the throat or neck or by blocking the nose and mouth of another person.]"¹⁸

["Torture" means the infliction of severe physical or mental pain upon the victim while he or she remains alive and conscious.]¹⁹

["Transportation system" means any system of transport established, acquired, purchased, constructed, extended, improved, maintained, operated, franchised, regulated or licensed by any municipality or county, or any transit authority created by them, including, but not limited to, taxicabs, airport limousines, and all other local carriers of passengers for hire.]²⁰

["Recklessly" means that a person acts recklessly with respect to circumstances surrounding the conduct or the result of the conduct when the person is aware of, but consciously disregards, a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the accused person's standpoint.]²¹

[The requirement of "recklessness" is also established if it is shown that the defendant acted knowingly or intentionally.]²²

"Knowingly" means that a person acts knowingly with respect to the conduct or to circumstances surrounding the conduct when the person is aware of the nature of the conduct or that the circumstances exist. A person acts knowingly with respect to a result of the person's conduct when the person is aware that the conduct is reasonably certain to cause the result.²³

[The requirement of "knowingly" is also established if it is shown that the defendant acted intentionally.]²⁴

"Intentionally" means that a person acts intentionally with respect to the nature of the conduct or to a result of the conduct when it is the person's conscious objective or desire to engage in the conduct or cause the result.²⁵

[only for offenses committed prior to 7/1/11: Any alleged victim includes a fetus which was viable at the time of injury. A fetus shall be considered viable if it had achieved a stage of development wherein it could reasonably be expected to be capable of living outside the uterus.²⁶ For you to find the defendant guilty of this offense committed upon a fetus, the state must have proven the viability of the fetus beyond a reasonable doubt.] **[only for offenses committed on or after 7/1/11 but prior to 7/1/12:** Any alleged victim includes a fetus if at the time of the alleged criminal act a victim was pregnant.] **[only for offenses committed on or after 7/1/12:** Any alleged victim includes a human embryo or fetus at any stage of gestation in utero.]²⁷

COMMENTS

1. Aggravated assault, Parts A through E, is a Class C felony. Aggravated assault, Part F, is a Class D felony. Aggravated assault, Part G, is a Class A misdemeanor. T.C.A. § 39-13-102(e)(1). However, if the jury finds that aggravated assault, Parts A, E or F, is committed against a law enforcement officer, the maximum fine the jury can assess is increased to \$15,000. If the jury finds in Parts A or F that the defendant committed the offense while acting in concert with two (2) or more other persons, which must be charged in the indictment, the punishment is increased to a Class B felony or a Class C felony, respectively. T.C.A. § 39-12-302.
2. A violation of T.C.A. § 39-15-401, child abuse and neglect, may be a lesser included offense of aggravated assault. T.C.A. § 39-15-401(f).
3. Effective consent of the alleged victim may be asserted as a defense to assault under T.C.A. § 39-13-104. If properly raised as a defense, the trial

judge should utilize T.P.I. – Crim. 40.17, Defense: Effective consent.

4. Tenn. Pub. Acts ch. 1006, §§ 2 & 4, effective 7/1/12, exempts from criminal liability “any act or omission by a pregnant woman with respect to an embryo or fetus with which she is pregnant.” See T.C.A. § 39-13-107(c) and -214(c). These statutes explicitly prohibit a criminal action against a woman for narcotic drug use that results in her newborn’s drug addiction or birth defects. See Tenn. Att’y Gen. Op. 13-01 (February 1, 2013), abrogating Tenn. Att’y Gen. Op. 08-114 (May 21, 2008).
5. If the substance in question is listed as prohibited in T.C.A. § 39-17-452, it is a controlled substance analogue by law and the jury can be so instructed. T.C.A. § 39-17-454(a)(1)(C). If not, it becomes a jury question and T.P.I. 31.20, Controlled substance analogue, must be given, which is a slight rewording of T.C.A. § 39-17-454(a) and (b).

¹ If the offense was committed prior to 1/1/07, the trial judge should research the history of the statutes to determine whether any changes to the elements or definitions in this instruction are necessary.

² T.C.A. § 39-13-102(a)-(d).

³ As the term “accidental means” is in common use and can be understood by persons of ordinary intelligence, it is not necessary for the court to define or explain it further. *State v. Hanson*, 279 S.W.3d 265, 282 (Tenn. 2009).

⁴ T.C.A. § 39-12-301(1).

⁵ T.C.A. § 39-11-106(a)(2).

⁶ T.C.A. § 39-15-401(a).

⁷ See Comment 5.

⁸ T.C.A. § 39-15-402(e).

⁹ T.C.A. § 39-11-106(a)(5).

¹⁰ Taken from *State v. Williams*, 690 S.W.2d 517, 529 (Tenn. 1985).

¹¹ T.C.A. § 39-11-106(a)(21).

¹² T.C.A. § 39-11-106(a)(2).

¹³ T.C.A. § 8-50-602.

¹⁴ T.C.A. § 39-11-106(a)(34). The trial judge may wish to omit the language “or a broken bone of a child who is eight (8) years of age or less” if not fairly raised in the proof.

¹⁵ T.C.A. § 39-11-106(a)(2).

¹⁶ T.C.A. §§ 39-15-402(d) and 39-11-106(a)(34). The trial judge may wish to omit the language “or a broken bone of a child who is eight (8) years of age or less” if not fairly raised in the proof.

¹⁷ T.C.A. § 39-11-106(a)(2).

¹⁸ T.C.A. § 39-13-102(a)(2).

¹⁹ Taken from *State v. Williams*, 690 S.W.2d 517, 529 (Tenn. 1985).

²⁰ T.C.A. § 7-56-102(a).

²¹ T.C.A. § 39-11-106(a)(31).

²² T.C.A. § 39-11-301(a)(2).

²³ T.C.A. § 39-11-106(a)(20).

²⁴ T.C.A. § 39-11-301(a)(2).

²⁵ T.C.A. § 39-11-106(a)(18).

²⁶ T.C.A. § 20-5-106(c); T.C.A. § 39-13-107; *Planned Parenthood v. Sundquist*, 38 S.W.3d 1, 17 (Tenn. 2000).

²⁷ T.C.A. § 39-13-107, amended eff. 7/1/11, no longer requires that the fetus be viable to be considered a victim.

T.P.I. -- CRIM. 6.02(a)

AGGRAVATED ASSAULT

(for offenses committed on or after 7/1/13)

Any person who commits the offense of aggravated assault is guilty of a crime.

For you to find the defendant guilty of this offense, the state must have proven beyond a reasonable doubt the existence of the following essential elements:¹

[Part A:

(1)(a) that the defendant intentionally or knowingly caused bodily injury to another;

or

(b) that the defendant intentionally or knowingly caused another to reasonably fear imminent bodily injury;

or

(c) that the defendant intentionally or knowingly caused physical contact with another and a reasonable person would regard that contact as extremely offensive or provocative;

and

(2)(a) that the act resulted in *[serious bodily injury to]* *[the death of]* another;

or

(b) that the act involved the use or display of a deadly weapon;

or

(c) that *[the act was intended to cause bodily injury to another by strangulation]* *[bodily injury by strangulation was attempted]*.

[and

(3) that the offense was committed against a *[law enforcement officer]* *[firefighter]* *[medical fire responder]* *[paramedic]* *[emergency medical technician]* *[health care provider]* *[first responder]* who was discharging or attempting to discharge *[his]* *[her]* official duties.]

[and

(4) that the defendant committed the offense while acting in concert with two (2) or more other persons.]]

or

[Part B:

(1) that the defendant was the *[parent or custodian of a child]* *[custodian of an adult]*;

and

(2)(a) that another person intentionally or knowingly caused bodily injury to the *[child]* *[adult]*;

or

(b) that another person intentionally or knowingly caused the *[child]* *[adult]* to reasonably fear imminent bodily injury;

or

(c) that another person intentionally or knowingly caused physical contact with the *[child]* *[adult]* and a reasonable person would regard that contact as extremely offensive or provocative;

and

(3)(a) that the act resulted in *[serious bodily injury to]* *[the death of]* the *[child]* *[adult]*;

or

(b) that the act involved the use or display of a deadly weapon;

or

(c) that *[the act was intended to cause bodily injury to another by strangulation]* *[bodily injury by strangulation was attempted]*.

and

(4) that the defendant intentionally or knowingly failed or refused to protect said *[child]* *[adult]* from the person's actions.]

or

[Part C:

(1) that the defendant was the parent or custodian of a child;

and

(2) that another person did knowingly, other than by accidental means,² treat such child in such a manner as to inflict injury;

and

(3)(a) that a *[deadly weapon]* *[dangerous instrumentality]* *[controlled substance]* *[controlled substance analogue]* was used to accomplish the act of abuse;

or

(b) that the act of abuse resulted in serious bodily injury to the child;

or

(c) that the act of abuse *[was especially heinous, atrocious or cruel]* *[involved the infliction of torture to the victim];*

or

(d) that the act of abuse resulted from the knowing exposure of the child to the initiation of a process intended to result in the manufacture of methamphetamine;

and

(4) that the defendant intentionally or knowingly failed or refused to protect said child from the act of abuse.]

or

[Part D:

(1) that the defendant was the *[parent or custodian of a child]* *[custodian of an adult];*

and

(2) that another person recklessly caused bodily injury to the *[child]* *[adult];*

and

(3)(a) that the act resulted in *[serious bodily injury to]* *[the death of]* another;

or

(b) that the act involved the use or display of a deadly weapon;

and

- (4) that the defendant intentionally or knowingly failed or refused to protect said *[child]* *[adult]* from the person's actions.]

or

[Part E:

- (1)(a) that the defendant intentionally or knowingly caused or attempted to cause bodily injury to the alleged victim;

or

- (b) that the defendant intentionally or knowingly committed or attempted to commit an assault against the alleged victim;

and

- (2) that the defendant did so after knowing the defendant had been enjoined or restrained by *[an order]* *[a diversion agreement]* *[a probation order]* of a court of competent jurisdiction from *[causing or attempting to cause bodily injury to]* *[committing or attempting to commit an assault against]* the alleged victim.

[and

- (3) that the offense was committed against a *[law enforcement officer]* *[firefighter]* *[medical fire responder]* *[paramedic]* *[emergency medical technician]* *[health care provider]* *[first responder]* who was discharging or attempting to discharge *[his]* *[her]* official duties.]]

or

[Part F:

(1) that the defendant recklessly caused bodily injury to another;

and

(2)(a) that the act resulted in *[serious bodily injury to] [the death of]* another;

or

(b) that the act involved the use or display of a deadly weapon;

[and

(3) that the offense was committed against a *[law enforcement officer]*
[firefighter] [medical fire responder] [paramedic] [emergency medical technician] [health care provider] [first responder] who was discharging or attempting to discharge *[his] [her]* official duties.]

[and

(4) that the defendant committed the offense while acting in concert with two
(2) or more other persons.]]

or

[Part G:

(1) that the defendant intended to cause physical injury to *[a public employee]*
[an employee of a public or private transportation system];

and

(2) that the defendant caused physical injury to such employee while the
[public employee was performing a duty within the scope of the employee's employment] [while the transportation system employee was performing an assigned duty on, or directly related to, the operation of a transit vehicle].

[and

- (3) that the offense was committed against a *[law enforcement officer]*
[firefighter] *[medical fire responder]* *[paramedic]* *[emergency medical technician]* *[health care provider]* *[first responder]* who was discharging or attempting to discharge *[his]* *[her]* official duties.]]

[The trial judge may wish to charge T.P.I. – Crim. 4.01, Criminal Attempt, in appropriate fact situations.]

["Acting in concert" means such conduct that would make one criminally responsible for committing or facilitating the offense.]³ [If this definition is charged, the trial judge should utilize T.P.I. – Crim. 3.01, Criminal Responsibility and T.P.I. – Crim. 3.02, Facilitation.]

["Bodily injury"] ["Injury"] includes a cut, abrasion, bruise, burn or disfigurement, and physical pain or temporary illness or impairment of the function of a bodily member, organ, or mental faculty.]⁴

["Child" means a person under eighteen (18) years of age.]⁵

["Controlled substance" means a drug, substance, or immediate precursor in Schedules I through VII of §§ 39-17-403 — 39-17-416. [_____] is a *[drug]* *[substance]* *[immediate precursor]* in Schedules I through VII of §§ 39-17-403 — 39-17-416.]

[[_____] is a controlled substance analogue.]⁶

[A "dangerous instrumentality" is any item that in the manner of its use or intended use as applied to a child is capable of producing serious bodily injury to a child.]⁷

["Deadly weapon" means a firearm or anything manifestly designed, made, or adapted for the purpose of inflicting death or serious bodily injury or anything that in the manner of its use or intended use is capable of causing death or serious bodily injury.]⁸

["Health care provider" means a person who is licensed, certified or otherwise authorized or permitted by the laws of this state to administer health care in the ordinary course of business in the practicing of a profession.]⁹

["Heinous" means grossly wicked or reprehensible, abominable; odious; vile. "Atrocious" means extremely evil or cruel; monstrous; exceptionally bad; abominable. "Cruel" means disposed to inflict pain or suffering; causing suffering; painful.]¹⁰

["Law enforcement officer" means an officer, employee or agent of government who has a duty imposed by law to:

(A) Maintain public order;

or

(B) Make arrests for offenses, whether that duty extends to all offenses or is limited to specific offenses;

and

(C) Investigate the commission or suspected commission of offenses.]¹¹

["Physical injury" includes a cut, abrasion, bruise, burn or disfigurement, and physical pain or temporary illness or impairment of the function of a bodily member, organ, or mental faculty.]¹²

["Public employee" means any person providing services for the state of Tennessee, state agencies, counties, municipalities, or subdivisions of such

governmental bodies in Tennessee for which compensation is paid.]]¹³

["Serious bodily injury" means bodily injury that involves a substantial risk of death; protracted unconsciousness; extreme physical pain; protracted or obvious disfigurement; or protracted loss or substantial impairment of a function of a bodily member, organ or mental faculty [or a broken bone of a child who is eight (8) years of age or less].]¹⁴ ["Bodily injury" includes a cut, abrasion, bruise, burn or disfigurement, and physical pain or temporary illness or impairment of the function of a bodily member, organ, or mental faculty.]]¹⁵

[only applicable if court instructs jury under Part C of this instruction:

["Serious bodily injury" means bodily injury that involves a substantial risk of death; protracted unconsciousness; extreme physical pain; protracted or obvious disfigurement; or protracted loss or substantial impairment of a function of a bodily member, organ or mental faculty [or a broken bone of a child who is eight (8) years of age or less]. Serious bodily injury to the child includes, but is not limited to, second or third degree burns, a fracture of any bone, a concussion, subdural or subarachnoid bleeding, retinal hemorrhage, cerebral edema, brain contusion, injuries to the skin that involve severe bruising or the likelihood of permanent or protracted disfigurement including those sustained by whipping children with objects.]]¹⁶ ["Bodily injury" includes a cut, abrasion, bruise, burn or disfigurement, and physical pain or temporary illness or impairment of the function of a bodily member, organ, or mental faculty.]]¹⁷

["Strangulation" means intentionally impeding normal breathing or circulation of the blood by applying pressure to the throat or neck or by blocking the nose and mouth of another person.]]¹⁸

["Torture" means the infliction of severe physical or mental pain upon the victim while he or she remains alive and conscious.]¹⁹

["Transportation system" means any system of transport established, acquired, purchased, constructed, extended, improved, maintained, operated, franchised, regulated or licensed by any municipality or county, or any transit authority created by them, including, but not limited to, taxicabs, airport limousines, and all other local carriers of passengers for hire.]²⁰

["Recklessly" means that a person acts recklessly with respect to circumstances surrounding the conduct or the result of the conduct when the person is aware of, but consciously disregards, a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the accused person's standpoint.]²¹

[The requirement of "recklessness" is also established if it is shown that the defendant acted knowingly or intentionally.]²²

"Knowingly" means that a person acts knowingly with respect to the conduct or to circumstances surrounding the conduct when the person is aware of the nature of the conduct or that the circumstances exist. A person acts knowingly with respect to a result of the person's conduct when the person is aware that the conduct is reasonably certain to cause the result.²³

[The requirement of "knowingly" is also established if it is shown that the defendant acted intentionally.]²⁴

"Intentionally" means that a person acts intentionally with respect to the nature of the conduct or to a result of the conduct when it is the person's conscious objective or desire to engage in the conduct or cause the result.²⁵

[Any alleged victim includes a human embryo or fetus at any stage of gestation in utero.]²⁶

Comments

1. Aggravated assault, Parts A through E, is a Class C felony. Aggravated assault, Part F, is a Class D felony. Aggravated assault, Part G, is a Class A misdemeanor. T.C.A. § 39-13-102(e)(1). If the jury finds the offense resulted in death, the sentence must be served at 75% release eligibility, less sentence reduction credits earned and retained. However, no credits shall reduce the release eligibility below 60%. T.C.A. § 40-35-501(k). If the jury finds that aggravated assault Parts A or E through G was committed against a law enforcement officer, firefighter, medical fire responder, paramedic, emergency medical technician, health care provider or any other first responder, the maximum fine the jury can assess is increased to \$15,000. If the jury finds in Parts A or F that the defendant committed the offense while acting in concert with two (2) or more other persons, which must be charged in the indictment, the punishment is increased to a Class B felony or a Class C felony, respectively. T.C.A. § 39-12-302.
2. A violation of T.C.A. § 39-15-401, child abuse and neglect, may be a lesser included offense of aggravated assault. T.C.A. § 39-15-401(f).
3. Effective consent of the alleged victim may be asserted as a defense to assault under T.C.A. § 39-13-104. If properly raised as a defense, the trial judge should utilize T.P.I. – Crim. 40.17, Defense: Effective consent.
4. Tenn. Pub. Acts ch. 1006, §§ 2 & 4, effective 7/1/12, exempts from criminal liability “any act or omission by a pregnant woman with respect to an embryo or fetus with which she is pregnant.” See T.C.A. § 39-13-107(c) and -214(c). These statutes explicitly prohibit a criminal action against a woman for narcotic drug use that results in her newborn’s drug addiction or birth defects. See Tenn. Att’y Gen. Op. 13-01 (February 1, 2013), abrogating Tenn. Att’y Gen. Op. 08-114 (May 21, 2008).
5. If the substance in question is listed as prohibited in T.C.A. § 39-17-452, it is a controlled substance analogue by law and the jury can be so instructed. T.C.A. § 39-17-454(a)(1)(C). If not, it becomes a jury question and T.P.I. 31.20,

Controlled substance analogue, must be given, which is a slight rewording of T.C.A. § 39-17-454(a) and (b).

¹ T.C.A. § 39-13-102(a)-(d).

² As the term “accidental means” is in common use and can be understood by persons of ordinary intelligence, it is not necessary for the court to define or explain it further. *State v. Hanson*, 279 S.W.3d 265, 282 (Tenn. 2009).

³ T.C.A. § 39-12-301(1).

⁴ T.C.A. § 39-11-106(a)(2).

⁵ T.C.A. § 39-15-401(a).

⁶ See Comment 3.

⁷ T.C.A. § 39-15-402(e).

⁸ T.C.A. § 39-11-106(a)(5).

⁹ T.C.A. § 39-13-101(c).

¹⁰ Taken from *State v. Williams*, 690 S.W.2d 517, 529 (Tenn. 1985).

¹¹ T.C.A. § 39-11-106(a)(21).

¹² T.C.A. § 39-11-106(a)(2).

¹³ T.C.A. § 8-50-602.

¹⁴ T.C.A. § 39-11-106(a)(34). The trial judge may wish to omit the language “or a broken bone of a child who is eight (8) years of age or less” if not fairly raised in the proof.

¹⁵ T.C.A. § 39-11-106(a)(2).

¹⁶ T.C.A. §§ 39-15-402(d) and 39-11-106(a)(34). The trial judge may wish to omit the language “or a broken bone of a child who is eight (8) years of age or less” if not fairly raised in the proof.

¹⁷ T.C.A. § 39-11-106(a)(2).

¹⁸ T.C.A. § 39-13-102(a)(2).

¹⁹ Taken from *State v. Williams*, 690 S.W.2d 517, 529 (Tenn. 1985).

²⁰ T.C.A. § 7-56-102(a).

²¹ T.C.A. § 39-11-106(a)(31).

²² T.C.A. § 39-11-301(a)(2).

²³ T.C.A. § 39-11-106(a)(20).

²⁴ T.C.A. § 39-11-301(a)(2).

²⁵ T.C.A. § 39-11-106(a)(18).

²⁶ T.C.A. § 39-13-107.

T.P.I. -- CRIM. 8.08(b)

TRAFFICKING FOR COMMERCIAL SEX ACT

Any person who commits the offense of trafficking for a commercial sex act is guilty of a crime.

For you to find the defendant guilty of this offense, the state must have proven beyond a reasonable doubt the existence of the following essential elements:¹

(1)(a) that the defendant *[subjected]* *[attempted to subject]* *[benefitted from]* *[attempted to benefit from]* another person's providing a commercial sex act;

or

(b) that the defendant *[recruited]* *[enticed]* *[harbored]* *[transported]* *[provided]* ***[Only for offenses committed on or after 7/1/13: [purchased]]*** *[obtained by any means]* another person for the purpose of providing a commercial sex act;

and

(2) that the defendant acted knowingly.

[and

(3) that the victim of the offense was a child under fifteen (15) years of age;

or

(4) that the offense occurred *[on the [grounds] [facilities]]* *[within one thousand feet (1,000')]* of a *[public or private school]* *[secondary*

*school] [preschool] [child care agency] [public library] [recreational center] [public park].]*²

“Blackmail” means threatening to expose or reveal the identity of another or any material, document, secret or other information that might subject a person to hatred, contempt, ridicule, loss of employment, social status or economic harm.³

"By any means" may include, but is not limited to:

- (1) Causing or threatening to cause physical harm to the person;
- (2) Physically restraining or threatening to physically restrain the person;
- (3) Abusing or threatening to abuse the law or legal process;
- (4) Knowingly destroying, concealing, removing, confiscating or possessing any actual or purported passport or other immigration document, or any other actual or purported government identification document, of the person;
- (5) Using blackmail or using or threatening to cause financial harm for the purpose of exercising financial control over the person; or
- (6) Facilitating or controlling a person's access to a controlled substance.⁴

["Coercion" means:

- (A) Causing or threatening to cause bodily harm to any person, physically restraining or confining any person or threatening to physically restrain or confine any person;

(B) Exposing or threatening to expose any fact or information that, if revealed, would tend to subject a person to criminal or immigration proceedings, hatred, contempt or ridicule;

(C) Destroying, concealing, removing, confiscating or possessing any actual or purported passport or other immigration document, or any other actual or purported government identification document, of any person; or

(D) Providing a drug, substance, controlled substance analogue or immediate precursor in Schedules I through VII of §§ 39-17-403 — 39-17-416 to a person. [] is a *[drug] [substance] [controlled substance analogue] [immediate precursor]* in Schedules I through VII of §§ 39-17-403 — 39-17-416.]⁵

[Only for offenses committed prior to 7/1/13: "Commercial sex act"
means any sexual act for which something of value is given or received.]⁶

or

[Only for offenses committed on or after 7/1/13: "Commercial sex act"
means:

(A) Any sexually explicit conduct for which anything of value is directly or indirectly given, promised to or received by any person, which conduct is induced or obtained by coercion or deception or which conduct is induced or obtained from a person under eighteen (18) years of age; or

(B) Any sexually explicit conduct that is performed or provided by any person, which conduct is induced or obtained by coercion or deception or which conduct is induced or obtained from a person under eighteen (18) years of age.]⁷

["Deception" means:

(A) Creating or confirming another person's impression of an existing fact or past event that is false and that the accused knows or believes to be false;

(B) Maintaining the status or condition of a person arising from a pledge by that person of personal services as security for a debt, if the value of those services as reasonably assessed is not applied toward the liquidation of the debt or the length and nature of those services are not respectively limited and defined, or preventing a person from acquiring information pertinent to the disposition of the debt; or

(C) Promising benefits or the performance of services that the accused does not intend to deliver or perform or knows will not be delivered or performed. Evidence of failure to deliver benefits or perform services standing alone is not sufficient for you to find the element of deception.]]⁸

["Maintain" means, in relation to labor or services, to secure continued performance of labor or services, regardless of any initial agreement on the part of the victim to perform such type of service.]]⁹

["Obtain" means, in relation to labor or services, to secure performance of labor or services.]]¹⁰

["Services" means an ongoing relationship between a person and the defendant in which the person performs activities under the supervision of or for the defendant.]]¹¹

["Sexually explicit conduct" means actual or simulated:

(A) Sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;

(B) Bestiality;

(C) Masturbation;

(D) Lewd exhibition of the genitals or pubic area of any person;

(E) Flagellation or torture by or upon a person who is nude;

(F) Condition of being fettered, bound or otherwise physically restrained on the part of a person who is nude;

(G) Physical contact in an act of apparent sexual stimulation or gratification with any person's unclothed genitals, pubic area or buttocks or with a female's nude breasts;

(H) Defecation or urination for the purpose of sexual stimulation of the viewer; or

(I) Penetration of the vagina or rectum by any object except when done as part of a recognized medical procedure.]]¹²

"Knowingly" means that a person acts knowingly with respect to the conduct or to circumstances surrounding the conduct when the person is aware of the nature of the conduct or that the circumstances exist. A person acts knowingly with respect to a result of the person's conduct when the person is aware that the conduct is reasonably certain to cause the result.¹³

The requirement of "knowingly" is also established if it is shown that the defendant acted intentionally.¹⁴

"Intentionally" means that a person acts intentionally with respect to the nature of the conduct or to a result of the conduct when it is the person's conscious objective or desire to engage in the conduct or cause the result.¹⁵

COMMENTS

1. Trafficking for a commercial sex act is a Class B felony, except it is a Class A felony when the victim of the offense is a child under fifteen (15) years of age, or when the offense occurs on the grounds or facilities or within one thousand feet (1,000') of a public or private school, secondary school, preschool, child care agency, public library, recreational center, or public park. T.C.A. § 39-13-309(c).

¹ T.C.A. § 39-13-309(a).

² T.C.A. § 39-13-309(c).

³ T.C.A. § 39-13-301(2).

⁴ T.C.A. § 39-13-309(b).

⁵ T.C.A. § 39-13-301(3) and T.C.A. § 39-17-402(4).

⁶ T.C.A. § 39-13-301(4) (Supp. 2012).

⁷ T.C.A. § 39-13-301(4).

⁸ T.C.A. § 39-13-301(5).

⁹ T.C.A. § 39-13-301(10).

¹⁰ T.C.A. § 39-13-301(12).

¹¹ T.C.A. § 39-13-301(13).

¹² T.C.A. § 39-13-301(14).

¹³ T.C.A. § 39-11-106(a)(20).

¹⁴ T.C.A. § 39-11-301(a)(2).

¹⁵ T.C.A. § 39-11-106(a)(18).

T.P.I. -- CRIM. 10.08(b)

PROMOTING TRAVEL FOR PROSTITUTION

Any person who commits the offense of promoting travel for prostitution is guilty of a crime.

For you to find the defendant guilty of this offense, the state must have proven beyond a reasonable doubt the existence of the following essential elements:¹

- (1) that the defendant *[sold]* *[offered to sell]* travel services;

and
- (2) that the defendant knew those services included travel for the purpose of engaging in what would be prostitution if occurring in this state.

"Prostitution" means engaging in, or offering to engage in, sexual activity as a business or being an inmate in a house of prostitution or loitering in a public place for the purpose of being hired to engage in sexual activity.²

"Sexual activity" means any sexual relations including homosexual sexual relations.³

"Travel services" means, but is not limited to, transportation by air, sea, road or rail, related ground transportation, hotel accommodations, or package tours, whether offered on a wholesale or retail basis.⁴

"Knew" means that a person acts knowingly with respect to the conduct or to circumstances surrounding the conduct when the person is aware of the nature of the conduct or that the circumstances exist. A person acts knowingly

with respect to a result of the person's conduct when the person is aware that the conduct is reasonably certain to cause the result.⁵

The requirement of "knew" is also established if it is shown that the defendant acted intentionally.⁶

"Intentionally" means that a person acts intentionally with respect to the nature of the conduct or to a result of the conduct when it is the person's conscious objective or desire to engage in the conduct or cause the result.⁷

COMMENTS

1. Promoting travel for prostitution is a Class D felony. T.C.A. § 39-13-533(c).

¹ T.C.A. § 39-13-533(a).

² T.C.A. § 39-13-512(6).

³ T.C.A. § 39-13-512(7).

⁴ T.C.A. § 39-13-533(b).

⁵ T.C.A. § 39-11-106(a)(20).

⁶ T.C.A. § 39-11-301(a)(2).

⁷ T.C.A. § 39-11-106(a)(18).

T.P.I. -- CRIM. 16.01

COMPUTER FRAUD

Any person who commits computer fraud is guilty of a crime.

For you to find the defendant guilty of this offense, the state must have proven beyond a reasonable doubt the existence of the following essential elements:¹

[Part A:

- (1) that the defendant, directly or indirectly, *[accessed]* *[caused to be accessed]* *[attempted to access]* any *[telephone system]* *[telecommunications facility]* *[computer software]* *[computer program]* *[data]* *[computer]* *[computer system]* *[computer network]* or any part thereof;

and

- (2) that the access was for the purpose of obtaining *[money]* *[property]* *[services]* for the defendant or another by means of false or fraudulent *[pretenses]* *[representations]* *[promises]*;

and

- (3) that the defendant acted knowingly.

[and

- (4) that the offense was committed in connection with an act of terrorism.]²

or

[Part B:

- (1) that the defendant, directly or indirectly, *[accessed]* *[caused to be accessed]* *[attempted to access]* any *[telephone system]* *[telecommunications facility]*

[computer software] [computer program] [data] [computer] [computer system]
[computer network] or any part thereof;

and

- (2) that the access was for the purpose of causing computer output to be purposely false for, but not limited to, the purpose of obtaining *[money]* *[property]* *[services]* for the defendant or another by means of false or fraudulent *[pretenses]* *[representations]* *[promises]*;

and

- (3) that the defendant acted knowingly.

[and

- (4) that the offense was committed in connection with an act of terrorism.]^{3]}

or

[PART C:

- (1) that the defendant, directly or indirectly, *[accessed]* *[caused to be accessed]* *[attempted to access]* any *[telephone system]* *[telecommunications facility]* *[computer software]* *[computer program]* *[data]* *[computer]* *[computer system]* *[computer network]* or any part thereof;

and

- (2) that the access was for the purpose of effecting the creation or alteration of *[a financial instrument]* *[an electronic transfer of funds]* with the intent to disrupt, alter, misappropriate, or commit fraud;

and

- (3) that the defendant acted knowingly.

[and

(4) that the offense was committed in connection with an act of terrorism.]]^{4]}

"Access" means to approach, instruct, communicate, or connect with, store data in, retrieve or intercept data from, or otherwise make use of any resources of a computer, computer system, or computer network, or information exchanged from any communication between computers or authorized computer users and electronic, electromagnetic, electrochemical, acoustic, mechanical, or other means.⁵

"Authorization" means any and all forms of consent, including both implicit and explicit consent.⁶

["Computer" means a device or collection of devices, including its support devices, peripheral equipment, or facilities, and the communication systems connected to it which can perform functions including, but not limited to, substantial computation, arithmetic or logical operations, information storage or retrieval operations, capable of being used with external files, one (1) or more operations which contain computer programs, electronic instructions, allows for the input of data, and output data (such operations or communications can occur with or without intervention by a human operator during the processing of a job).]⁷

["Computer network" means a set of two (2) or more computer systems that transmit data over communication circuits connecting them, and input/output devices including, but not limited to, display terminals and printers, which may also be connected to telecommunication facilities.]]⁸

["Computer program" means an ordered set of data that are coded instructions or statements that, when executed by a computer, cause the computer to process data.]]⁹

["Computer software" means a set of computer programs, procedures, and associated documentation concerned with the operation of a computer, computer system, or computer network whether imprinted or embodied in the computer in any manner or separate from it, including the supporting materials for the software and accompanying documentation.]¹⁰

["Computer system" means a set of connected devices including a computer and other devices including, but not limited to, one (1) or more of the following: data input, output, or storage devices, data communication circuits, and operating system computer programs that make the system capable of performing data processing tasks.]¹¹

["Data" means a representation of information, knowledge, facts, concepts, or instructions which is being prepared or has been prepared in a formalized manner, and is intended to be stored or processed, or is being stored or processed, or has been stored or processed in a computer, computer system, or computer network.]¹²

["Financial instrument" includes, but is not limited to, any check, cashier's check, draft, warrant, money order, certificate of deposit, negotiable instrument, letter of credit, bill of exchange, credit card, debit card, marketable security, or any computer system representation thereof.]¹³

["Fraud" is defined as the term is used in normal conversation and includes, but is not limited to, deceit, trickery, misrepresentation and subterfuge.]¹⁴

["Input" means data, facts, concepts, or instructions in a form appropriate for delivery to, or interpretation or processing by, a computer.]¹⁵

["Output" means data, facts, concepts or instructions produced or retrieved by computers from computers or computer memory storage devices.]¹⁶

["Property" shall include:

- (A) real property;
- (B) computers and computer networks; and
- (C) financial instruments, computer data, computer programs, computer software, and all other personal property regardless of whether they are:
 - (i) tangible or intangible; (ii) in a format readable by humans or by a computer; (iii) in transit between computers or within a computer network or between any devices which comprise a computer; or (iv) located on any paper or in any device in which it is stored by a computer or by a human.]¹⁷

["Services" includes, but is not limited to, the use of a computer, a computer system, a computer network, computer software, computer program, or data to perform tasks.]¹⁸

["To process" means to use a computer to put data through a systematic sequence of operations for the purpose of producing a specified result.]¹⁹

"Knowingly" means that a person acts knowingly with respect to the conduct or to circumstances surrounding the conduct when the person is aware of the nature of the conduct or that the circumstances exist. A person acts knowingly with respect to a result of the person's conduct when the person is aware that the conduct is reasonably certain to cause the result.²⁰

The requirement of "knowingly" is also established if it is shown that the defendant acted intentionally.²¹

"Intentionally" means that a person acts intentionally with respect to the nature of the conduct or to a result of the conduct when it is the person's conscious objective or desire to engage in the conduct or cause the result.²²

[The trial judge should now instruct the jury with respect to fixing value utilizing T.P.I. -- CRIM. 11.03(a), Fixing Value, using both sections (A) and (I), if applicable.]

COMMENTS

1. Accessing a computer by means of false or fraudulent pretenses, representations or promises is punished as theft under T.C.A. § 39-14-105. T.C.A. § 39-14-602(a). See the comment to T.P.I. – Crim. 11.01, Theft of property. Any person who violates this section in connection with an act of terrorism commits a Class A felony. T.C.A. § 39-14-602(d).
2. See T.P.I. – Crim. 2.06, Burden of proof: Venue (computer offenses).

¹ T.C.A. § 39-14-602(a).

² The trial judge may wish to utilize T.P.I. – Crim. 30.15, Terrorism.

³ The trial judge may wish to utilize T.P.I. – Crim. 30.15, Terrorism.

⁴ The trial judge may wish to utilize T.P.I. – Crim. 30.15, Terrorism.

⁵ T.C.A. § 39-14-601(1).

⁶ T.C.A. § 39-14-601(2).

⁷ T.C.A. § 39-14-601(3).

⁸ T.C.A. § 39-14-601(5).

⁹ T.C.A. § 39-14-601(6).

¹⁰ T.C.A. § 39-14-601(7).

¹¹ T.C.A. § 39-14-601(8).

¹² T.C.A. § 39-14-601(9).

¹³ T.C.A. § 39-14-601(11).

¹⁴ T.C.A. § 39-11-106(a)(13).

¹⁵ T.C.A. § 39-14-601(12).

¹⁶ T.C.A. § 39-14-601(15).

¹⁷ T.C.A. § 39-14-601(17).

¹⁸ T.C.A. § 39-14-601(18).

¹⁹ T.C.A. § 39-14-601(20).

²⁰ T.C.A. § 39-11-106(a)(20).

²¹ T.C.A. § 39-11-301(a)(2).

²² T.C.A. § 39-11-106(a)(18).

T.P.I. -- CRIM. 16.02

COMPUTER TAMPERING

Any person who commits computer tampering is guilty of a crime.

For you to find the defendant guilty of this offense, the state must have proven beyond a reasonable doubt the existence of the following essential elements:¹

[Part A:

- (1) that the defendant, without authorization, directly or indirectly, accessed any *[computer]* *[computer system]* *[computer network]*;

and

- (2) that the defendant acted intentionally.

[and

- (3) that the offense was committed in connection with an act of terrorism.]²

or

[Part B:

- (1)(a) that the defendant, without authorization, directly or indirectly, *[altered]* *[damaged]* *[destroyed]* *[attempted to damage]* *[attempted to destroy]* *[caused the disruption to the proper operation of]* any computer;

or

- (b) that the defendant, without authorization, directly or indirectly, performed any act which was responsible for the disruption of any *[computer]* *[computer system]* *[computer network]* *[computer software]* *[computer program]* *[data which resides or exists internal or external to a computer, computer system or computer network]*;

and

- (2) that the defendant acted intentionally.

[and

- (3) that the offense was committed in connection with an act of terrorism.]^{3]}

or

[Part C:

- (1) that the defendant, without authorization, directly or indirectly, introduced or was responsible for the malicious input of any computer contaminant into any *[computer] [computer system] [computer network]*;

and

- (2) that the defendant acted intentionally.

[and

- (3) that the offense was committed in connection with an act of terrorism.]^{4]}

or

[Part D:

- (1) that the defendant, without authorization, directly or indirectly *[accessed] [caused to be accessed] [attempted to access] any computer software, computer network, or any part thereof;*

and

- (2) that this act was committed *[for the purpose of maliciously gaining access to computer material] [to tamper maliciously with computer security devices including, but not limited to, system hackers];*

and

(3) that the defendant acted intentionally.

[and

(4) that the offense was committed in connection with an act of terrorism.]^{5]}

or

[PART E:

(1) that the defendant, without authorization, directly or indirectly *[made]*
[caused to be made] an unauthorized copy, in any form, including, but not
limited to any *[printed]* *[electronic form of]* computer *[data]* *[programs]*
[software] *[residing in]* *[communicated by]* *[produced by]* a computer or
computer network;

and

(2) that the defendant acted intentionally.

[and

(3) that the offense was committed in connection with an act of terrorism.]^{6]}

["Access" means to approach, instruct, communicate, or connect with, store data
in, retrieve or intercept data from, or otherwise make use of any resources of a
computer, computer system, or computer network, or information exchanged from any
communication between computers or authorized computer users and electronic,
electromagnetic, electrochemical, acoustic, mechanical, or other means.]^{7]}

"Authorization" means any and all forms of consent, including both implicit and
explicit consent.^{8]}

"Computer" means a device or collection of devices, including its support
devices, peripheral equipment, or facilities, and the communication systems connected

to it which can perform functions including, but not limited to, substantial computation, arithmetic or logical operations, information storage or retrieval operations, capable of being used with external files, one (1) or more operations which contain computer programs, electronic instructions, allows for the input of data, and output data (such operations or communications can occur with or without intervention by a human operator during the processing of a job).⁹

["Computer contaminants" means any set of computer instructions that are designed to modify or in any way alter, damage, destroy, or disrupt the proper operation of a computer system, or computer network without the intent or authorization of the owner of the information. They include, but are not limited to, a group of computer instructions commonly called viruses or worms, which are self-replicating or self-propagating and are designed to contaminate other computer programs or computer data, consume computer resources, modify, destroy, record or transmit data, or in some other fashion usurp the normal operation of the computer, computer system, or computer network. Some contaminants may include:

(A) "Virus," meaning a migrating program which, at least, attaches itself to the operating system of any computer it enters and can infect any other computer that has access to an "infected" computer;

(B) "Worm," meaning a computer program or virus that spreads and multiplies, eventually causing a computer to "crash" or cease functioning, but does not attach itself to the operating system of the computer it "infects".]¹⁰

["Computer network" means a set of two (2) or more computer systems that transmit data over communication circuits connecting them, and input/output devices

including, but not limited to, display terminals and printers, which may also be connected to telecommunication facilities.]]¹¹

"Computer program" means an ordered set of data that are coded instructions or statements that, when executed by a computer, cause the computer to process data.¹²

["Computer software" means a set of computer programs, procedures, and associated documentation concerned with the operation of a computer, computer system, or computer network whether imprinted or embodied in the computer in any manner or separate from it, including the supporting materials for the software and accompanying documentation.]]¹³

["Computer system" means a set of connected devices including a computer and other devices including, but not limited to, one (1) or more of the following: data input, output, or storage devices, data communication circuits, and operating system computer programs that make the system capable of performing data processing tasks.]]¹⁴

["Data" means a representation of information, knowledge, facts, concepts, or instructions which is being prepared or has been prepared in a formalized manner, and is intended to be stored or processed, or is being stored or processed, or has been stored or processed in a computer, computer system, or computer network.]]¹⁵

"Input" means data, facts, concepts, or instructions in a form appropriate for delivery to, or interpretation or processing by, a computer.¹⁶

["Malicious" means without just cause or excuse.]]¹⁷

"Output" means data, facts, concepts or instructions produced or retrieved by computers from computers or computer memory storage devices.¹⁸

["Owner" means an owner or lessee of a computer or a computer network, or an owner, lessee or licensee of computer data, computer programs, or computer software.]¹⁹

["System hacker" means any person who knowingly accesses and without authorization alters, damages, deletes, destroys, or otherwise uses any data, computer, computer system, or computer network.]²⁰

"To process" means to use a computer to put data through a systematic sequence of operations for the purpose of producing a specified result.²¹

["Knowingly" means that a person acts knowingly with respect to the conduct or to circumstances surrounding the conduct when the person is aware of the nature of the conduct or that the circumstances exist. A person acts knowingly with respect to a result of the person's conduct when the person is aware that the conduct is reasonably certain to cause the result.]²²

[The requirement of "knowingly" is also established if it is shown that the defendant acted intentionally.]²³

"Intentionally" means that a person acts intentionally with respect to the nature of the conduct or to a result of the conduct when it is the person's conscious objective or desire to engage in the conduct or cause the result.²⁴

[For Parts B and E, the trial judge should now instruct the jury with respect to fixing value utilizing T.P.I. -- CRIM. 11.03(a), Fixing Value, using both sections (A) and (I), if applicable.]

[It is a defense to prosecution for the offense in Part A of this instruction that a computer network was operated in such a way as to allow anonymous access to that network.]²⁵

COMMENTS

1. A violation of Part A is a Class C misdemeanor. T.C.A. § 39-14-602(b)(1). A violation of Part B is punished as theft under T.C.A. § 39-14-105. T.C.A. § 39-14-602(b)(2). See the comment to T.P.I. – Crim. 11.01, Theft of property. A violation of Part C is a Class B misdemeanor. T.C.A. § 39-14-602(b)(3). A violation of Part D is a Class A misdemeanor. T.C.A. § 39-14-602(b)(4). A violation of Part E is punished as theft under T.C.A. § 39-14-105. T.C.A. § 39-14-602(b)(5). Any person who violates this section in connection with an act of terrorism commits a Class A felony. T.C.A. § 39-14-602(d).
2. See T.P.I. – Crim. 2.06, Burden of proof: Venue (computer offenses).

¹ T.C.A. § 39-14-602(b).

² The trial judge may wish to utilize T.P.I. – Crim. 30.15, Terrorism.

³ The trial judge may wish to utilize T.P.I. – Crim. 30.15, Terrorism.

⁴ The trial judge may wish to utilize T.P.I. – Crim. 30.15, Terrorism.

⁵ The trial judge may wish to utilize T.P.I. – Crim. 30.15, Terrorism.

⁶ The trial judge may wish to utilize T.P.I. – Crim. 30.15, Terrorism.

⁷ T.C.A. § 39-14-601(1).

⁸ T.C.A. § 39-14-601(2).

⁹ T.C.A. § 39-14-601(3).

¹⁰ T.C.A. § 39-14-601(4).

¹¹ T.C.A. § 39-14-601(5).

¹² T.C.A. § 39-14-601(6).

¹³ T.C.A. § 39-14-601(7).

¹⁴ T.C.A. § 39-14-601(8).

¹⁵ T.C.A. § 39-14-601(9).

¹⁶ T.C.A. § 39-14-601(12).

¹⁷ Black's Law Dictionary (7th Ed.).

¹⁸ T.C.A. § 39-14-601(15).

¹⁹ T.C.A. § 39-14-601(16).

²⁰ T.C.A. § 39-14-601(19).

²¹ T.C.A. § 39-14-601(20).

²² T.C.A. § 39-11-106(a)(20).

²³ T.C.A. § 39-11-301(a)(2).

²⁴ T.C.A. § 39-11-106(a)(18).

²⁵ T.C.A. § 39-14-602(b)(1).

T.P.I. -- CRIM. 16.03

**RECEIVING, CONCEALING OR USING PROCEEDS RESULTING FROM
COMPUTER [FRAUD] [TAMPERING]**

Any person who receives, conceals, uses or aids another in receiving, concealing or using proceeds resulting from computer *[fraud]* *[tampering]* is guilty of a crime.

For you to find the defendant guilty of this offense, the state must have proven beyond a reasonable doubt the existence of the following essential elements:¹

[Part A:

- (1) that the defendant *[received]* *[concealed]* *[used]* *[aided another in receiving]* *[concealing]* *[using]]* any proceeds resulting from computer *[fraud²]* *[tampering³]*;

and

- (2) that the defendant acted knowingly.

[and

- (3) that the offense was committed in connection with an act of terrorism.]⁴

or

[Part B:

- (1) that the defendant *[received]* *[concealed]* *[used]* *[aided another in receiving]* *[concealing]* *[using]]* any *[books]* *[records]* *[documents]* *[property]* *[financial instrument]* *[computer software]* *[computer program]* *[other material, property or objects]* obtained as the result of computer *[fraud⁵]* *[tampering⁶]*;

and

- (2) that the defendant acted knowingly.

[and

(3) that the offense was committed in connection with an act of terrorism.]]^{7]}

"Computer" means a device or collection of devices, including its support devices, peripheral equipment, or facilities, and the communication systems connected to it which can perform functions including, but not limited to, substantial computation, arithmetic or logical operations, information storage or retrieval operations, capable of being used with external files, one (1) or more operations which contain computer programs, electronic instructions, allows for the input of data, and output data (such operations or communications can occur with or without intervention by a human operator during the processing of a job).⁸

["Computer network" means a set of two (2) or more computer systems that transmit data over communication circuits connecting them, and input/output devices including, but not limited to, display terminals and printers, which may also be connected to telecommunication facilities.]]⁹

"Computer program" means an ordered set of data that are coded instructions or statements that, when executed by a computer, cause the computer to process data.¹⁰

["Computer software" means a set of computer programs, procedures, and associated documentation concerned with the operation of a computer, computer system, or computer network whether imprinted or embodied in the computer in any manner or separate from it, including the supporting materials for the software and accompanying documentation.]]¹¹

["Computer system" means a set of connected devices including a computer and other devices including, but not limited to, one (1) or more of the following: data input,

output, or storage devices, data communication circuits, and operating system computer programs that make the system capable of performing data processing tasks.]]¹²

["Data" means a representation of information, knowledge, facts, concepts, or instructions which is being prepared or has been prepared in a formalized manner, and is intended to be stored or processed, or is being stored or processed, or has been stored or processed in a computer, computer system, or computer network.]]¹³

["Financial instrument" includes, but is not limited to, any check, cashier's check, draft, warrant, money order, certificate of deposit, negotiable instrument, letter of credit, bill of exchange, credit card, debit card, marketable security, or any computer system representation thereof.]]¹⁴

"Input" means data, facts, concepts, or instructions in a form appropriate for delivery to, or interpretation or processing by, a computer.¹⁵

"Output" means data, facts, concepts or instructions produced or retrieved by computers from computers or computer memory storage devices.¹⁶

["Property" shall include:

- (A) real property;
- (B) computers and computer networks; and
- (C) financial instruments, computer data, computer programs, computer software, and all other personal property regardless of whether they are:
 - (i) tangible or intangible; (ii) in a format readable by humans or by a computer; (iii) in transit between computers or within a computer network or between any devices which comprise a computer; or (iv) located on any

paper or in any device in which it is stored by a computer or by a human.]¹⁷

"To process" means to use a computer to put data through a systematic sequence of operations for the purpose of producing a specified result.¹⁸

"Knowingly" means that a person acts knowingly with respect to the conduct or to circumstances surrounding the conduct when the person is aware of the nature of the conduct or that the circumstances exist. A person acts knowingly with respect to a result of the person's conduct when the person is aware that the conduct is reasonably certain to cause the result.¹⁹

The requirement of "knowingly" is also established if it is shown that the defendant acted intentionally.²⁰

"Intentionally" means that a person acts intentionally with respect to the nature of the conduct or to a result of the conduct when it is the person's conscious objective or desire to engage in the conduct or cause the result.²¹

[The trial judge should now instruct the jury with respect to fixing value utilizing T.P.I. -- CRIM. 11.03(a), Fixing Value, using both sections (A) and (I), if applicable.]

COMMENTS

1. Receiving, concealing, using or aiding another in receiving, concealing or using proceeds from computer fraud or tampering is punished as theft under T.C.A. § 39-14-105. T.C.A. § 39-14-602(c). See the comment to T.P.I. – Crim. 11.01, Theft of property. Any person who violates this section in connection with an act of terrorism commits a Class A felony. T.C.A. § 39-14-602(d).
2. See T.P.I. – Crim. 2.06, Burden of proof: Venue (computer offenses).

¹ T.C.A. § 39-14-602(c).

² The trial judge will need to instruct the jury as to Part A, Part B or Part C, whichever is applicable, of T.P.I. – Crim. 16.01, Computer fraud.

³ The trial judge will need to instruct the jury as to Part B only of T.P.I. – Crim. 16.02, Computer tampering.

⁴ The trial judge may wish to utilize T.P.I. – Crim. 30.15, Terrorism.

⁵ The trial judge will need to instruct the jury as to Part A, Part B or Part C, whichever is applicable, of T.P.I. – Crim. 16.01, Computer fraud.

⁶ The trial judge will need to instruct the jury as to Part B only of T.P.I. – Crim. 16.02, Computer tampering.

⁷ The trial judge may wish to utilize T.P.I. – Crim. 30.15, Terrorism.

⁸ T.C.A. § 39-14-601(3).

⁹ T.C.A. § 39-14-601(5).

¹⁰ T.C.A. § 39-14-601(6).

¹¹ T.C.A. § 39-14-601(7).

¹² T.C.A. § 39-14-601(8).

¹³ T.C.A. § 39-14-601(9).

¹⁴ T.C.A. § 39-14-601(11).

¹⁵ T.C.A. § 39-14-601(12).

¹⁶ T.C.A. § 39-14-601(15).

¹⁷ T.C.A. § 39-14-601(17).

¹⁸ T.C.A. § 39-14-601(20).

¹⁹ T.C.A. § 39-11-106(a)(20).

²⁰ T.C.A. § 39-11-301(a)(2).

²¹ T.C.A. § 39-11-106(a)(18).

T.P.I. -- CRIM. 31.11(a)

PRESCRIPTION DRUG FRAUD

Any person who knowingly or intentionally *[acquires] [obtains] [attempts to acquire] [attempts to obtain]* possession of a controlled substance by *[misrepresentation] [fraud] [forgery] [deception] [subterfuge] [identity theft]* is guilty of a crime.

For you to find the defendant guilty of this offense, the state must have proven beyond a reasonable doubt the existence of the following essential elements:¹

- (1) that the defendant did *[acquire] [obtain] [attempt to acquire] [attempt to obtain]* possession of _____, a Schedule ____ controlled substance;

and

- (2) that the defendant did so by the use of *[misrepresentation] [fraud] [forgery] [deception] [subterfuge] [identity theft]*²;

and

- (3) that the defendant acted knowingly or intentionally.

[The trial judge may wish to utilize T.P.I. - Crim. 4.01, Criminal Attempt.]

["Deception" occurs when a person knowingly creates or reinforces a false impression by words or conduct, including false impressions of fact, law, value or intention or other state of mind that the person does not believe to be true. Deception occurs when a person knowingly employs a scheme to defraud.]³

["Forgery" means to alter, make, complete, execute or authenticate any writing so that it purports to be the act of another who did not authorize that act.]⁴

["Fraud" is defined as the term is used in normal conversation and includes, but

is not limited to, deceit, trickery, misrepresentation and subterfuge.]]⁵

["Misrepresentation" means any manifestation by words or other conduct by one (1) person to another that, under the circumstances, amounts to an intentional assertion not in accordance with the true facts; or an untrue statement of fact, intentionally made, which when given its natural and ordinary meaning leads the mind of the person to whom it is made to a false understanding of the facts or conditions that exist; a statement made and intended to deceive or mislead.]]⁶

["Subterfuge" means any plan or action which is intended to deceive or mislead a person upon whom some scheme or strategy is employed to achieve a result that would not otherwise be accomplished.]]

"Knowingly" means that a person acts knowingly with respect to the conduct or to circumstances surrounding the conduct when the person is aware of the nature of the conduct or that the circumstances exist. A person acts knowingly with respect to a result of the person's conduct when the person is aware that the conduct is reasonably certain to cause the result.⁷

"Intentionally" means that a person acts intentionally with respect to the nature of the conduct or to a result of the conduct when it is the person's conscious objective or desire to engage in the conduct or cause the result.⁸

COMMENTS

1. Prescription drug fraud shall be punished in the same manner as a violation of T.P.I. – Crim. 31.11, Obtaining controlled substance by fraud. T.C.A. § 53-11-416(a)(6).
2. A violation of this offense is a continuing offense because it may involve an unlawful taking and use of personal identifying information that remains in the lawful possession of a victim wherever the victim currently resides or is found.

Such unlawful taking and use may be elements of this offense and continues to occur wherever the victim resides or is found. T.C.A. § 53-11-416(a)(2).

The term “victim” shall include, but not be limited to, the person whose personal identifying information, as defined in § 39-14-150(e), was acquired, obtained, possessed, bought, or used in violation of this offense or sold, transferred, given, traded, loaned, delivered, or possessed in violation of this offense. The term “victim” shall also include, but not be limited to, a physician, nurse practitioner, or other health care provider whose personal identifying information was unlawfully used. T.C.A. § 53-11-416(a)(3).

If a victim of this offense resides or is found in this state, an essential element of the offense is committed in this state, and a defendant is subject to prosecution in this state, regardless of whether the defendant was ever actually in this state. T.C.A. § 53-11-416(a)(4).

Venue for this offense shall be in any county where an essential element of the offense was committed, including, but not limited to, in any county where the victim resides or is found, regardless of whether the defendant was ever actually in such county. T.C.A. § 53-11-416(a)(5).

¹ T.C.A. § 53-11-416(a)(1).

² The trial judge should charge TPI – Crim. 11.35(a), Identity theft, if this bracket is used.

³ T.C.A. § 39-11-106(a)(6).

⁴ T.C.A. § 39-14-114(b).

⁵ T.C.A. § 39-11-106(a)(13).

⁶ *Black's Law Dictionary* (8th Ed. 2004).

⁷ T.C.A. § 39-11-106(a)(20).

⁸ T.C.A. § 39-11-106(a)(18).

T.P.I. – CRIM. 31.21

**CONTROLLED SUBSTANCE ANALOGUES: UNLAWFUL
REPRESENTATION, ADVERTISEMENT OR INFERENCE**

Any person who commits the offense of unlawful *[representation]*
[advertisement] *[inference]* of a controlled substance analogue is guilty of a
crime.

For you to find the defendant guilty of this offense, the state must have
proven beyond a reasonable doubt the existence of the following essential
elements:¹

- (1) that the defendant *[represented, orally or in writing,]* *[advertised]*
[inferred] that a substance *[was a derivative of, or substantially
similar to, the chemical structure of a controlled substance]* *[had a
stimulant, depressant, or hallucinogenic effect on the central
nervous system substantially similar to or greater than the
stimulant, depressant, or hallucinogenic effect on the central
nervous system of a controlled substance]* *[was (insert here a
substance listed in § 39-17-452)];*

and

- (2) that the substance was a controlled substance analogue;

and

- (3) that the defendant acted intentionally, knowingly or recklessly.²

[_____] is a controlled substance analogue.³

[_____] is a controlled substance.⁴

"Recklessly" means that a person acts recklessly with respect to circumstances surrounding the conduct or the result of the conduct when the person is aware of, but consciously disregards, a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the accused person's standpoint.⁵

"Knowingly" means that a person acts knowingly with respect to the conduct or to circumstances surrounding the conduct when the person is aware of the nature of the conduct or that the circumstances exist. A person acts knowingly with respect to a result of the person's conduct when the person is aware that the conduct is reasonably certain to cause the result.⁶

"Intentionally" means that a person acts intentionally with respect to the nature of the conduct or to a result of the conduct when it is the person's conscious objective or desire to engage in the conduct or cause the result.⁷

[It is not a defense that the controlled substance analogue (A) is not a derivative of a controlled substance, (B) does not have a chemical structure that is substantially similar to that of a controlled substance, (C) does not have a stimulant, depressant, hallucinogenic effect on the central nervous system substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance, or (D) is not listed in § 39-17-452.]⁸

COMMENTS

1. A violation of this offense is a Class A misdemeanor. T.C.A. § 39-17-454(g)(4). However, the building and premises of any business in or upon which a violation is committed by an employee, agent or owner of such business is declared to be a public nuisance and shall be subject to abatement as provided in title 29, chapter 3. T.C.A. § 39-17-454(j).

¹ T.C.A. § 39-17-454(f)(1).

² T.C.A. § 39-11-301(b) and T.C.A. § 39-11-301(c) and accompanying Sentencing Commission Comment.

³ The trial judge should include this bracketed language if the controlled substance analogue is one listed in T.C.A. § 39-17-452 as an analogue. If it is not listed, it will be a jury question, and the trial judge should utilize 31.20, Controlled Substance Analogue.

⁴ “Controlled substance” means a drug, substance or immediate precursor in Schedules I through VII of §§ 39-17-403 – 39-17-416. T.C.A. § 39-17-402(4).

⁵ T.C.A. § 39-11-106(a)(31).

⁶ T.C.A. § 39-11-106(a)(20).

⁷ T.C.A. § 39-11-106(a)(18).

⁸ T.C.A. § 39-17-454(f)(2).

T.P.I. -- CRIM. 38.02

DRIVING UNDER THE INFLUENCE: LAWFUL USE NOT A DEFENSE

[For offenses committed prior to 7/1/12: If it appears from the proof that the defendant was driving under the influence of either narcotic drugs or barbitol drugs, it is not a defense to driving under the influence of an intoxicant or drug that the defendant [was legally able to take such drug] and/or [had a valid prescription from a physician to take such drug or drugs].

Whether or not the defendant was under the influence of any drug and whether or not this was in combination with any intoxicant is for you to determine based upon all of the proof in the case.]

or

[For offenses committed on or after 7/1/12, but prior to 7/1/13: If it appears from the proof that the defendant was driving under the influence of any intoxicant, marijuana, controlled substance, drug or substance affecting the central nervous system or combination thereof that impairs the driver's ability to safely operate a motor vehicle, it is not a defense to driving under the influence that the defendant was or had been entitled to use one (1) or more of such intoxicants, marijuana, controlled substances, drugs, or substances.

Whether or not the defendant was under the influence of any intoxicant, marijuana, controlled substance, drug or substance affecting the central nervous system or combination thereof is for you to determine based upon all of the proof in the case.]¹

or

[For offenses committed on or after 7/1/13: If it appears from the proof that the

defendant was driving under the influence of any intoxicant, alcohol, marijuana, controlled substance, controlled substance analogue, drug, substance or combination thereof that causes impairment, it is not a defense to driving under the influence that the defendant was or had been entitled to use one (1) or more of such intoxicants, marijuana, controlled substances, controlled substance analogues, drugs, or substances.

Whether or not the defendant was under the influence of any intoxicant, marijuana, controlled substance, controlled substance analogue, drug or substance or combination thereof is for you to determine based upon all of the proof in the case.]²

¹T.C.A. § 55-10-402 (Supp. 2012).

²T.C.A. § 55-10-411.

T.P.I. -- CRIM. 42.11(a)

PRIOR STATEMENT OF THE DEFENDANT

The Court instructs you that if there is evidence of an oral or written statement given by the defendant in this case, you may take it into consideration with all of the other facts and circumstances proven in the case. In considering the statement, it is for you, the Jury, to say what weight you will give the statement.

You may believe any part of the statement or disbelieve any part of it, and you may believe the whole statement, or disbelieve it in its entirety.

T.P.I. -- CRIM. 43.01

**WHEN RULE 29 MOTION FOR JUDGMENT OF ACQUITTAL IS
GRANTED IN PART**

This court has removed from your consideration the charge(s) of _____ as contained in *[count(s) _____]* *[indictment(s) _____]*. No further instructions concerning these charges will be provided, and you should not speculate as to the reason for the removal of these charges or as to the absence of instructions on these charges.¹

[Only if motion is made and granted to strike the evidence pertaining to dismissed charges: All evidence pertaining solely to these removed charges is irrelevant to the guilt or innocence of the defendant as to the remaining charges, and you will strike this evidence from your consideration and not use it in deliberation. This evidence cannot be considered for any purpose against the defendant, nor can any inference be drawn from it.]

[Only if motion is made to allow/restrict the State's use of evidence pertaining to the dismissed charges in closing argument, and that use is allowed after a Tenn. R. Evid. 404(b) hearing:² If you find proof has been offered as to the guilt or innocence of the defendant regarding a charge in the indictment that has been removed from your consideration, you may not consider such evidence to prove *[his]* *[her]* disposition to commit such a crime as *[that]* *[those]* still remaining on trial. This evidence may only be considered by you for the limited purpose of determining whether it provides. (Here the trial judge may wish to consult the language used to describe various purposes listed in T.P.I. –

Crim. 42.10, Evidence of other crimes.))]

COMMENTS

1. This instruction should be read to the jury after the motion for judgment of acquittal has been granted in part, but prior to defense proof or closing argument. It should also be given to the jury in writing at the end of the trial with the rest of the jury instructions.

¹See *State v. Little*, 2013 Tenn. LEXIS 309, 35-36 (Tenn. Mar. 22, 2013).

²*Id.* at 23-24.